

No. 12777

2672

United States
Court of Appeals
for the Ninth Circuit.

FENWAL, INCORPORATED, a Corporation,
Appellant,

vs.

W. RAY MONTGOMERY, FREDERICK H.
MONTGOMERY and MONTGOMERY
BROTHERS, a Partnership,
Appellees.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

APR 11 1951



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plainants, Cross-Appellants and Appellees.

District Court of the United States, for the North-
ern District of California, Southern Division
Civil Action No. 28851R

FENWAL, INCORPORATED, a Corporation,
Plaintiff,

vs.

W. RAY MONTGOMERY, FREDERICK H.
MONTGOMERY and MONTGOMERY
BROTHERS, a Partnership,
Defendants,

COMPLAINT FOR BREACH OF CONTRACT

Comes now the plaintiff above named and for a
cause of action against said defendants alleges:

1. Plaintiff is a corporation, duly organized and
existing under the laws of the Commonwealth of
Massachusetts, and duly authorized and qualified
to do business in the State of California. Defend-
ants W. Ray Montgomery and Frederick H. Mont-
gomery are co-partners doing business as a part-
nership under the laws of the State of California,
under the firm name of Montgomery Brothers. De-
fendants are and each of them is a citizen of the
State of California. The matter in controversy ex-
ceeds, exclusive of interest and costs, the sum of
three thousand dollars.

2. On May 26, 1944, plaintiff and defendants,
for a valuable consideration, entered into a contract
in writing, a copy of which is attached hereto as
Exhibit A. Said contract was later amended by a
written agreement dated October 11, 1946, a copy
of which is attached hereto as Exhibit B.

3. Pursuant to paragraph 8 of the said contract, plaintiff terminated this contract by a letter dated December 29, 1948, a copy of which is attached hereto as Exhibit C, which termination became effective at the close of business on February 28, 1949.

4. Plaintiff has duly performed and observed all the provisions and conditions of such contract on its part to be performed and observed.

5. Defendants are indebted to plaintiff in the sum of \$47,333.69 under said contract, for goods sold and delivered by plaintiff to defendants from January 1, 1949, through February 23, 1949, on orders placed by the defendants with plaintiff, pursuant to said contract. Defendants have failed and refused to pay said sum or any part thereof although plaintiff has demanded payment thereof.

6. By reason of the foregoing facts, plaintiff has been damaged in the sum of \$47,333.69.

Wherefore, plaintiff demands judgment against defendants in the sum of forty-seven thousand three hundred thirty-three and sixty-nine hundredths Dollars (\$47,333.69), with interest thereon from February 23, 1949, and the costs of this action.

/s/ BURNHAM ENERSEN,

/s/ FELIX F. STUMPF,

McCUTCHEN, THOMAS,
MATTHEW, GRIFFITHS &
GREENE,

Attorneys for Plaintiff.

EXHIBIT A

This Is an Agreement dated May 26, 1944, between Fenwal Incorporated, a Massachusetts corporation with its principal place of business at Ashland, Massachusetts, hereinafter called Fenwal, and Montgomery Brothers, a partnership with its usual place of business at San Francisco, California, hereinafter called Montgomery.

Witnesseth: That

Whereas Fenwal produces Fenwal Thermo-switches, hereinafter referred to as switches, and Montgomery desires to be appointed exclusive representative for the sale of the switches in the territory described below.

Now Therefore, in consideration of the promises herein contained and other consideration paid by each party to the other, receipt of which is hereby acknowledged, it is agreed:

1. Fenwal hereby appoints Montgomery its exclusive representative for the sale of switches in the following states and territories, which are collectively referred to in this agreement as the territory:

Washington, Oregon, Idaho, Western Montana, Nevada, Utah, Arizona, California, Hawaii, and Alaska.

2. Montgomery will sell switches only to customers located in the territory and only at Fenwal's list prices and established discounts plus transportation charges from Ashland, Massachusetts, which charges shall not exceed ten (10) per cent of Fen-

wal's net prices. It is agreed that no device or arrangement is to be entered into by Montgomery with any customer which will in any way result in sales below Fenwal's list prices plus transportation charges as provided for in this agreement.

3. Montgomery will use its best efforts to obtain orders for switches and agrees to pay its traveling and other expenses. Montgomery agrees that it will not incur any expenses on behalf of Fenwal or make any representations or agreements which shall bind or purport to bind Fenwal.

4. Montgomery will purchase from Fenwal and at all times carry in stock reasonable quantities of the various types of switches produced by Fenwal in order to be in a position to make prompt shipment of the same to Montgomery's customers.

5. Fenwal will sell switches to Montgomery at the following prices:

A. Either at a discount from Fenwal's list prices of 50% and 10%; or

B. At Fenwal's list prices less Fenwal's usual representative's commissions, provided that the commissions to be allowed Montgomery shall not be less than 10% of Fenwal's net F.O.B. prices at Ashland, Massachusetts. The fixing of the commission at not less than 10% is necessary to compensate Montgomery for the expense of billing customers and for assuming all credit risks.

Unless Fenwal is otherwise notified by Montgomery, all items sold under this agreement shall be priced as stated in subparagraph A of this paragraph.

6. All orders and inquiries received by Fenwal from customers in the territory shall be promptly referred to Montgomery.

7. Nothing in this agreement shall be construed as creating an employer-employee relationship between Fenwal and Montgomery or any other relationship between them except that of seller and buyer.

8. This agreement shall continue in force until terminated by either party, but may be terminated by either party upon sixty days' written notice given by the ordinary mail to the last known address of the other party. At the termination of this contract, Montgomery agrees to return to Fenwal all samples, papers, price lists or belongings of Fenwal which may be in the possession of Montgomery at the time and an active list of purchasers of switches.

9. This contract was made and executed in the State of Massachusetts and is to be construed and interpreted under the laws of that State.

10. The decision of Fenwal on any questions as to the origin of sales or the disposition of commissions shall be conclusive and final.

In Witness Whereof the parties have caused this

agreement to be executed by their duly authorized representatives.

FENWAL INCORPORATED,

By W. J. TURENNE,
Vice-President.

MONTGOMERY BROTHERS,

By F. H. MONTGOMERY.

May 1, 1944

Mr. Fred Montgomery,
Montgomery Brothers,
61 Fremont Street,
San Francisco, California

Dear Fred:

While your brother Ray was here in Ashland, we submitted to him two copies of a new contract which is to supersede our Sales Contract with you dated March 2, 1942. It is quite probable that he has mailed the copies of the new contract to you.

This new contract does not expressly deal with special products which you or we, or both of us working together, may develop to meet the special requirements of your customers.

This will confirm our understanding that as to such products the discount we are to give you from the price to your customers will be fixed by agreement between us. In the event that we fail to agree on a commission, Fenwal's decision shall be accepted as final. The discount is to compensate you

fairly for your selling work, for any engineering or similar work done by you and for taking the credit risk. The rate of discount will vary depending on any of several factors such as the amount of engineering work done by either of us and depending on the size of the orders for the special product involved.

You may wish to attach this letter to the copies of the new contract.

With kind regards,

FENWAL INCORPORATED,

/s/ W. J. TURENNE,

Vice-President and Manager.

EXHIBIT B

This Is an Agreement, dated October 11, 1946, between Fenwal Incorporated and Montgomery Brothers amending and supplementing their agreement dated May 26, 1944, and incorporating the agreements which have been made by the parties orally or by letters since May 26, 1944, and this agreement therefore states the entire agreement between the parties.

For consideration received by each party from the other, it is agreed:

1. Sub-paragraph A of paragraph 5 of the agreement of May 26, 1944, is amended by changing the figure "10%," which appears once in sub-paragraph A, to "15%."

2. Sub-paragraph B of paragraph 5 of the agreement of May 26, 1944, is amended by changing the figure "10%," which appears twice in sub-paragraph B, to "15%."

3. The commission or discount to be allowed by Fenwal Incorporated to Montgomery Brothers on sales of Unit Fire Detectors made in Montgomery Brothers' territory is to be 15% instead of 20% as previously agreed by letter.

4. On the sale of any special Thermoswitches or other special items which do not appear in Fenwal's catalog, Fenwal Incorporated is to allow Montgomery Brothers a commission or discount of 20% of the net price to customers in Montgomery Brothers' territory only.

If and when any special Thermoswitch or special item is made a standard Fenwal catalog item by Fenwal Incorporated, the commission or discount shall thereafter be as provided in paragraph 5 of the original agreement, dated May 26, 1944, and as amended by paragraphs 1 and 2 above.

In Witness Whereof, the parties have caused this agreement to be executed by their duly authorized representatives.

FENWAL INCORPORATED,
By J. M. STORKERSON.

MONTGOMERY BROTHERS,
By F. H. MONTGOMERY.

EXHIBIT C

Air Mail

Registered—Return Receipt Requested

December 29, 1948

Montgomery Brothers
1122 Howard Street
San Francisco, California

Gentlemen:

This will notify you that we elect to terminate our agreement with you dated May 26, 1944, as amended by our agreement dated October 11, 1946, this termination to be effective sixty (60) days after the receipt by you of this letter.

We believe that it will be possible for you and us to work out the details of the handling of orders which we have received from you either by correspondence or telephone, but we shall be glad to confer with you about this if you feel that it is desirable that we do so.

Very truly yours,

FENWAL INCORPORATED,

C. W. WALTER,
President.

CWW:MM

[Endorsed]: Filed May 14, 1949.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 28851-R

FENWAL, INCORPORATED,

Plaintiff,

vs.

W. RAY MONTGOMERY, FREDERICK H.
MONTGOMERY, and MONTGOMERY
BROTHERS, a Partnership,

Defendants.

W. RAY MONTGOMERY and FREDERICK H.
MONTGOMERY, Doing Business Under the
Firm Name and Style of MONTGOMERY
BROTHERS,

Cross-Complainants,

vs.

FENWAL, INCORPORATED,

Cross-Defendant.

ANSWER AND CROSS-COMPLAINT

Come now the defendants above named, and answering plaintiff's complaint on file herein, admit, deny and allege as follows:

I.

Deny that the plaintiff and defendants, for a valuable consideration, entered into a contract in writing, a copy of which is attached to plaintiff's complaint and marked Exhibit "A"; and in this

respect defendants allege that on or about May 1, 1944, and May 26, 1944, plaintiff and defendants, for a valuable consideration, entered into a contract in writing, a copy of which is attached hereto and marked Exhibit "A"; that said contract was amended by written agreement dated October 11, 1946, a copy of which is attached hereto and marked Exhibit "B."

II.

Defendants admit the allegations of paragraph III of plaintiff's complaint, and in this respect allege that the said termination referred to in the letter of December 29, 1948, which was to have become effective as of the close of business on February 28, 1949, was by mutual agreement of the parties thereto set aside and after February 28, 1949, it was of no force and effect, and that said parties continued to perform under and by virtue of the contracts herein referred to as having been made and entered into on May 1, 1944, and May 26, 1944, and amended October 11, 1946.

III.

Defendants deny that the plaintiff has fully performed and/or observed all of the provisions and/or conditions of such contracts on its part to be performed and/or observed.

IV.

Defendants deny that they are indebted to the plaintiff in the sum of \$47,333.69 under said contract for goods sold and/or delivered by plaintiff to defendants from January 1, 1949, through Feb-

ruary 23, 1949, and in this respect allege that they have withheld payment for goods sold and/or delivered in the sum of \$46,422.89, and further allege that the plaintiff is indebted to the defendants by way of offset in the sum of \$38,103.18, being the amount of profit that the defendants would have made had the plaintiff filled all orders lodged by the defendants with the plaintiff up to and including February 28, 1949, and for the period between February 28, 1949, and May 18, 1949.

That in the performance of the terms and provisions of said contract it was the practice of the parties for the defendants to lodge with the plaintiff certain specified orders, giving the names and addresses of the purchasers, the articles to be shipped to the purchasers, and that thereafter the plaintiff would bill the defendants for the price of the commodity as referred to in said contract, and then the defendants would make, as their profit, the difference between the price charged the purchaser and the price due the plaintiff at the rates established by the said contract. That the plaintiff failed, neglected and refused to fill sales orders lodged with it by defendants, and that the defendants were thereby deprived of a profit in the said sum of \$38,103.18.

V.

That on or about the 9th day of March, 1949, the defendants assigned to the plaintiff all of the unfilled orders which they had lodged with the plaintiff, which had not up to that time been filled, without prejudice to the rights of the defendants

to any and all profits that they would have made had said orders been filled directly by said plaintiff prior to the alleged termination date.

Further Answering Said Complaint, and by Way of Cross-Complaint, Cross-Complainants Complain of Cross-Defendant and for Cause of Action Allege:

I.

That at all times herein mentioned W. Ray Montgomery and Frederick H. Montgomery were, and now are, citizens of the State of California, and were and now are partners doing business under the name and style of Montgomery Brothers in the State of California; that the cross-defendant is a corporation duly organized under the laws of the State of Massachusetts and duly authorized and qualified to do business in the State of California. That the matter in controversy exceeds, exclusive of interest, the sum of \$3,000.00.

II.

That on or about the 1st day of May, 1944, and the 26th day of May, 1944, cross-complainants and cross-defendant, for a valuable consideration, entered into a contract in writing, a copy of which is attached hereto and marked Exhibit "A"; that said contract was amended by written agreement dated October 11, 1946, a copy of which is attached hereto and marked Exhibit "B."

III.

That in the performance of said contract, wherein

cross-complainants became the representatives of cross-defendant, it was the practice for the cross-complainants to lodge with the cross-defendant the names and addresses of purchasers, the commodity and delivery date thereof, and that thereafter the cross-defendant would send the said commodity directly to the purchaser, billing the same to the cross-complainants at the prices established under and by the terms of the contracts herein referred to as Exhibit "A" and Exhibit "B," and that the **cross-complainants** would bill the purchasers at the purchase price which had been agreed upon by and between the cross-complainants and the purchasers, and cross-complainants would receive as their profit the difference between the price for which the commodity was billed by the cross-defendant to the cross-complainants and the price charged by the cross-complainants to the purchasers.

That prior to February 28, 1949, the cross-complainants lodged sales orders with the cross-defendant under and pursuant to the terms of said Exhibits "A" and "B," at a purchase price of \$166,192.75, and that the cross-complainants had sold said commodities to their purchasers for the sum of \$202,548.47, making a profit to the cross-complainants in the sum of \$38,103.18.

That the cross-defendant had not filled said orders prior to February 28, 1949, resulting in damages to the cross-complainants in the sum of \$38,103.18.

IV.

That on or about the 9th day of March, 1949, the

cross-complainants assigned to the cross-defendant any and all unfilled orders with their purchasers, without constituting a waiver of any of the rights of cross-complainants against cross-defendant arising out of the contracts herein referred to as Exhibits "A" and "B."

V.

That by reason of the foregoing, cross-complainants have been damaged in the sum of \$38,103.18.

Further Answering Said Complaint and as a Second Ground of Cross-Complaint, Cross-Complainants Complain of Cross-Defendant and for Cause of Action Allege:

I.

Cross-complainants incorporate herein paragraph I of their first ground of cross-complaint and make the same a part hereof as though fully set out at length herein.

II.

That cross-complainants have, for thirty years last past, engaged in the business of representing manufacturers, and during said period of time have created an organization for the carrying on of said business in various cities in the United States. That one of their principal places of business is located in the City of Los Angeles, County of Los Angeles, State of California. That in the year 1939 they employed as a junior salesman one Edgar V. Hawkins at a salary of \$135.00 per month, and that since said time, by reason of training given the said

Hawkins by cross-complainants and by reason of various articles of merchandise handled by cross-complainants, the said Edgar V. Hawkins became the manager of said Los Angeles office of said cross-complainants, and that during the year 1948, the compensation paid said Edgar V. Hawkins as office manager of said Los Angeles office was in excess of \$10,000.00.

III.

That prior to the 29th day of December, 1948, the cross-defendant, anticipating the writing of the letter of December 29, 1948, and realizing the ability, knowledge, training and experience of the said Edgar V. Hawkins as said manager of cross-complainants at their Los Angeles office, and the fact that the said Hawkins knew the contents of and had access to all of the books, records and files of the customers of cross-complainants, and had for many years prior thereto been in communication with the customers in said area, and realizing that his services would be beneficial to the cross-defendant after the termination date set forth in said letter of December 29, 1948, to wit, February 28, 1949, in the selling of articles manufactured by cross-defendant, which said articles are referred to in the contracts hereunto attached and marked Exhibits "A" and "B," knowingly, wrongfully and maliciously enticed the said Edgar V. Hawkins and prevailed upon the said Hawkins to resign his position as office manager of said cross-complainants and to resign from his said employment with cross-complainants, and accept and take employment with

the cross-defendant, who at said time had established an office and place of business at 111 South Burlington Avenue, in the City of Los Angeles, County of Los Angeles, State of California, and did employ, and does now continue to employ the said Edgar V. Hawkins as manager of the Los Angeles branch office of the cross-defendant.

That the cross-defendant has advised customers of the cross-complainants in and about the Los Angeles area of the appointment of said Edgar V. Hawkins as manager of the Los Angeles branch office of the cross-defendant, and has capitalized the ability, knowledge and training of the said Edgar V. Hawkins for the purpose of taking from the cross-complainants many of their Los Angeles customers and their trade.

IV.

That by reason of the foregoing acts and activities of the cross-defendant, the cross-complainants and said cross-complainants' business have been damaged in the sum of \$50,000.00 actual damages and the sum of \$25,000.00 exemplary damages.

Wherefore, defendants and cross-complainants pray that plaintiff take nothing by its complaint on file herein, and that they have judgment against cross-defendant in the sum of \$113,103.18.

CHRISTIN, KEEGAN &
CARROLL,

By /s/ CHARLES A. CHRISTIN,
Attorneys for Defendants and
Cross-Complainants.

State of California,
City and County of San Francisco—ss.

Frederick H. Montgomery, being first duly sworn,
deposes and says:

That he is one of the defendants and cross-complainants in the above-entitled action; that he has read the foregoing Answer and Cross-Complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

/s/ FREDERICK H.
MONTGOMERY.

Subscribed and sworn to before me this 15th day
of August, 1949.

[Seal] /s/ LOUIS WIENER,
Notary Public in and for the City and County of
San Francisco, State of California.

EXHIBITS A AND B

[Exhibits A and B attached to the foregoing Answer and Cross-Complaint are identical to Exhibits A and B attached to the Complaint for Breach of Contract. See pages 5 to 9 of this printed record.]

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 15, 1949.

[Title of District Court and Cause.]

ANSWER TO CROSS-COMPLAINT

Comes now the Cross-Defendant above named and answering the cross-complaint herein, denies, admits and alleges as follows:

Answer to the First Cause of Action of Cross-Complaint

I.

Admits the allegations of paragraph I of said cause of action.

II.

Admits the allegations of paragraph II of said cause of action.

III.

Denies each and every, all and singular, the allegations of paragraphs III, IV and V of said cause of action.

As a First, Further, Separate and Distinct Answer and Defense to Said First Cause of Action, Cross-Defendant Alleges:

That the sum of \$30,359.53 was due and payable on February 10, 1949, by cross-complainants to cross-defendant for goods sold and delivered by cross-defendant to cross-complainants through January 31, 1949; that cross-complainants failed to pay said sum on said date; that such failure to pay on the part of the cross-complainants was a default under said contract; that the said default has not

been cured and that the said sum is still due and unpaid by cross-complainants; and that cross-complainants' default relieved cross-defendant from any, all and each obligation on its part to be observed and performed under said contract.

Answer to Second Cause of Action of
Cross-Complaint

I.

Answering the allegations of paragraph I of said cause of action, incorporates by reference as though here set out in full the contents of paragraph I of the Answer to cross-complainants' first cause of action.

II.

Denies each and every, all and singular, the allegations of paragraph II of said cause of action.

III.

Answering the allegations of paragraph III of said cause of action, admits that Edgar V. Hawkins accepted employment with the cross-defendant after resigning from his employment with cross-complainants, and that the said Edgar V. Hawkins is now employed by the cross-defendant; denies each and every, all and singular, the remaining allegations of said paragraph III.

IV.

Denies each and every, all and singular, the allegations of paragraph IV of said cause of action.

Wherefore, cross-defendant prays cross-complainants take nothing by their cross-complaint, and each

cause of action thereof be dismissed with prejudice; that it be awarded its costs of suit herein incurred; and that it receive such other and further relief as may be just and proper.

/s/ FELIX F. STUMPF,

McCUTCHEN, THOMAS,
MATTHEW, GRIFFITHS
& GREENE,

Attorneys for Plaintiff and
Cross-Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 20, 1949.

[Title of District Court and Cause.]

REQUEST FOR INTERROGATORIES
DIRECTED TO J. M. STORKERSON

To: McCutchen, Thomas, Matthew, Griffiths & Greene, and Felix F. Stumpf, Esq., Attorneys for Plaintiff and Cross-Defendant Fenwal Incorporated, a Corporation:

Pursuant to the provisions of law, Rule 33 of the Federal Rules of Civil Procedure, the defendants herein address to the plaintiff Fenwal, Incorporated, the following interrogatories to be answered separately, fully and under oath by J. M. Storkerson, General Manager of Fenwal, Incorporated:

1. What is your official position of employment with the plaintiff Fenwal, Incorporated?

2. Were you the general manager of said Fenwal, Incorporated, in the months of December, 1948, January, February, March, April and May, 1949?

3. Did you have a conversation with Frederick H. Montgomery and W. Ray Montgomery at the offices of Montgomery Brothers, 1122 Howard Street, San Francisco, California, on or about January 24, 1949?

4. Prior to January 24, 1949, and, to wit, on January 11, 1949, did you send the following telegram?

“January 11, 1949

“Montgomery Bros.

“Attn: F. H. Montgomery

“1122 Howard Street

“San Francisco, Calif.

“Would like to have discussion with you in San Francisco January 24th if this is agreeable.

“FENWAL INC.,

“J. M. STORKERSON.”

5. On January 12, 1949, did you receive from Montgomery Brothers the following telegram:

“January 12, 1949

“Mr. J. M. Storkerson

“Fenwal Incorporated

“Ashland, Massachusetts

“Retel will be glad to see you January 24 in San Francisco. Regards.

“MONTGOMERY BROTHERS,

“F. H. MONTGOMERY.”

6. Was there anyone else present besides yourself, Frederick H. Montgomery and W. Ray Montgomery at the conference held on or about January 24, 1949, at the office of Montgomery Brothers in San Francisco?

7. What is your best recollection as to what was said by each of the persons present at said conference?

8. Did you after said conference leave San Francisco and go to Los Angeles?

9. In Los Angeles did you have a conference or conferences with W. Ray Montgomery?

10. Where were these conferences held and who was present?

11. In the said conference which was held during the latter part of January, 1949, was anything said by either Frederick H. Montgomery or W. Ray Montgomery to you regarding the fact that Edgar V. Hawkins had left their employ?

12. If your answer to the foregoing interrogatory is yes, what was said by each of the persons at said conference?

13. Did you on that day hand to Montgomery Brothers a letter dated January 20, 1949, on the letterhead of Fenwal, Incorporated, signed by C. W. Walter, President?

14. If your answer to the foregoing interrogatory is yes, what was said by each of the persons present at said conference, regarding the contents or any part of the contents of said letter?

15. Do you recall anything specifically that was said by any party present at said conference with reference to the following language in said letter:

“We see no reason why you should be surprised by our action as we have repeatedly brought to your attention the fact that we have not been satisfied with your representation of us in the territory covered by our agreement.”

16. Will you state how or in what manner it was repeatedly brought to the attention of Montgomery Brothers that Fenwal, Incorporated, had not been satisfied with their representation of Fenwal, Incorporated, in the territory covered by the agreement?

17. Did you have a conversation with W. Ray Montgomery at the factory of Fenwal, Incorporated, at Ashland, Massachusetts, in the latter part of September or early part of October, 1948?

18. If your answer to the foregoing interrogatory is yes, who was present at the time, and what to your best recollection was said by each of the persons who participated in said conversation?

19. Prior to December 31, 1948, did you have a conversation or conversations with Edgar V. Hawkins pertaining to his becoming an employee of Fenwal, Incorporated, for the territory in and about Los Angeles, California?

20. If your answer to the foregoing interrogatory is yes, who was present at the conversation and what was said by all parties present at said conversation?

21. When for the first time did you first discuss with Edgar V. Hawkins, his employment as an employee of Fenwal, Incorporated?

22. If you did have such a conversation with Edgar V. Hawkins, where was said conversation held, who was present and what was said by all parties thereto?

23. Who was the person who negotiated the lease for the premises now occupied by Fenwal, Incorporated, in the City of Los Angeles, California?

24. When were the negotiations commenced for the leasing of said premises for Fenwal, Incorporated?

25. Did you at any time, orally or by letter, notify or inform Montgomery Brothers that you had employed Edgar V. Hawkins to represent Fenwal, Incorporated, or to work for Fenwal, Incorporated, in the Los Angeles area?

26. If your answer to the foregoing interrogatory is yes, state in full when and how said information was given to Montgomery Brothers.

27. Did you in the conversation held at San Francisco, during the latter part of January, 1949, discuss the personnel of Fenwal, Incorporated, in Los Angeles area with regard to the number of employees and number of engineers to be employed in conducting said office?

28. In said conversation held in the latter part of January, 1949, what if anything was said by any

of the parties present as to a settlement with reference to an adjustment of profits coming to Montgomery Brothers on unfilled orders?

29. Were the terms of the letter of January 20, 1949, herein above referred to and particularly pertaining to the fourth paragraph thereof, reading as follows:

“We note that you expect us to accept all orders that you place with us until the date of termination of the agreement, regardless of the release schedules and dates of shipments, and that you expect shipments to be made on all orders now at the factory and those placed prior to the termination date. That expectation on your part seems to us unfair to Fenwal and not in accordance with our contract with you. We expect to fill orders which have been accepted by us or may later be accepted by us, provided you carry out your part of the contract. It seems likely that the filling of those orders will involve an adjustment of the discount or commission allowed to you, but we shall not try to discuss details in this letter,”

discussed by the parties at said conversation held January 24, 1949?

30. If your answer to the foregoing interrogatory is yes, what was said by all parties present pertaining thereto?

31. In the foregoing conversation do you recall anything having been said with reference to Montgomery Brothers retaining 50% of the profits on

orders assigned pertaining to the aircraft industry, up to the end of February, 1949, provided that Montgomery Brothers retained the representation of Fenwal, Incorporated, in the balance of the area which they served prior to the termination of the contract?

32. If your answer to the foregoing interrogatory is yes, state what was said by all persons present pertaining thereto.

33. Have you given us all that you recollect occurred at the conference held in San Francisco during the latter part of January, 1949?

33a. At the said conversation did you state in substance that you would go back to Fenwal's factory and endeavor to sell them the ideas which were set forth by Montgomery Brothers at that time?

34. At the termination of this conversation did you make arrangements to meet W. Ray Montgomery at Los Angeles at some early date thereafter?

35. Following the conference hereinabove referred, did you go back to Los Angeles? If so, what date did you leave and when did you arrive in Los Angeles?

36. Did you meet W. Ray Montgomery in Los Angeles at the offices of Montgomery Brothers, 849 E. 8th Street, Los Angeles, during the latter part of January, 1949?

37. What is your best recollection as to the date this conversation was held?

38. Who was present at this conversation?

39. What was said by each of the persons present at that conversation?

40. Did you on the afternoon of January 27, 1949, go with W. Ray Montgomery and Frederick H. Montgomery to the Douglas Aircraft Company?

41. If your answer to the foregoing interrogatory is yes, did you have a conversation at Douglas Aircraft Company and who was present at this conversation. What was said by the parties present?

42. In this conversation was Mr. Edgar V. Hawkins introduced to Mr. Dorn of Douglas Aircraft Company as the person who would be the manager or representative of Fenwal, Incorporated, in the Los Angeles area?

43. Did you thereafter and while in Los Angeles, together with Edgar V. Hawkins and W. Ray Montgomery call on the North American Aircraft and Lockheed Aircraft companies?

44. If your answer to the foregoing interrogatory is yes, what to the best of your recollection, was the date of these conferences, and who were the persons present, and what was said at that time?

45. Do you recall that at one of these conversations a Mr. McChesney commented on the fact that Mr. Hawkins had been taken from Montgomery Brothers by your firm?

46. If you answer to the foregoing interrogatory is yes, what was said by Mr. McChesney?

47. After your visits to the aircraft companies on the twenty-seventh and twenty-eighth of January, 1949, did you thereafter and on the following Sunday morning, have a conference or conversation with W. Ray Montgomery and Edgar V. Hawkins, first at the Biltmore Hotel and then at the Savoy Hotel in Los Angeles?

48. If your answer to the foregoing interrogatory is yes, what was said by all the persons present at said conference or said conversations?

49. What, if anything, was said in this conversation, with reference to the continued handling of the Boeing account at Seattle by Montgomery Brothers?

50. Did you in the last referred to conversation state in substance that you had telephoned and discussed the matter with your company and that it was still open and upon your return to the offices of your company you would communicate with Montgomery Brothers pertaining to an adjustment of the entire matter?

51. Did you in this last referred to conversation state in substance to W. Ray Montgomery and Frederick H. Montgomery that Fenwal, Incorporated, had employed Edgar V. Hawkins, either as a manager for the Los Angeles area, or a representative, of Fenwal, Incorporated?

52. Had you prior to this conversation advised either W. Ray Montgomery and Frederick H. Montgomery that Edgar V. Hawkins was to be the Los Angeles manager for Fenwal, Incorporated?

53. Have you in your possession any letter or letters, or communications in writing, from Montgomery Brothers, which in substance provide that the payments to be made by Montgomery Brothers to Fenwal, Incorporated, are to be made on or before the tenth day of each succeeding month?

54. If your answer to the foregoing interrogatory is yes, kindly attach copy or copies of said communications to your reply to these interrogatories.

55. Have you a copy of the financial statement of Fenwal, Incorporated, for any of the following months: December, 1948; January, February, 1949?

56. If your answer to the foregoing interrogatory is yes, kindly attach a copy thereof to your reply to these interrogatories; if your answer is no, kindly attach the last financial statement prior to said time.

57. Were you in the City of Los Angeles, California, on or about March 9 or 10, 1949?

58. Did you see W. Ray Montgomery in Los Angeles at that time?

59. If your answer to the last interrogatory is yes, when and where, and who was present and what was said by the persons present at the time

any conversation was held?

60. Was Mr. Robinson present at these conversations?

61. If your answer to the foregoing interrogatory is yes, was Mr. Robinson at any time connected with Fenwal, Incorporated? If so, in what capacity?

62. Did you at this conversation advise W. Ray Montgomery why you came to Los Angeles?

63. What, if anything, was said in these conversations with reference to an assignment of certain orders that Montgomery Brothers had with Fenwal, Incorporated?

64. On how many occasions did you see W. Ray Montgomery in the month of March, 1949, in Los Angeles?

65. Where did you see him and did you have conversations with him? Who was present and what was said?

66. In these conversations was anything said about assignments? If so, what was said?

67. Did you call on the aircraft companies with W. Ray Montgomery? If so, what aircraft companies did you call, and if conversations were had at the aircraft companies, state who was present and what was said.

68. Were assignments made executed and delivered to the aircraft company orders?

69. If your answer is yes to the foregoing in-

terrogatory, attach copies to your reply to these interrogatories.

70. Did you come to the City and County of San Francisco in the month of March, 1949?

71. If your answer is yes to the foregoing interrogatory, did you have a conversation or conversations with Frederick H. Montgomery at the office of Montgomery Brothers, 1122 Howard Street, San Francisco, California?

72. If your answer to the foregoing interrogatory is yes, to the best of your recollection, who was present at these conversations and what was said by the parties who participated at said conversations?

CHRISTIN, KEEGAN &
CARROLL,

By /s/ CHARLES A. CHRISTIN,
Attorneys for Defendants.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 1, 1950.

[Title of District Court and Cause.]

ANSWERS OF J. M. STORKERSON TO
INTERROGATORIES

To: Christin, Keegan & Carroll, Attorneys for Defendants and Cross-Complainants W. R. Montgomery and Frederick H. Montgomery, doing

business under the firm name and style of Montgomery Brothers:

Pursuant to your request for interrogatories, J. M. Storkerson answers each interrogatory as follows:

1. Vice President and General Manager.

2. Yes.

3. Yes.

4. Yes.

5. Yes.

6. Not that I remember.

7. To the best of my recollection the substance of the conference was as follows:

I said that I had come West to work out the procedure for putting through the termination of the contract. One of the Montgomery brothers asked what the reasons of the termination were. I gave Dr. Walter's letter to the Montgomerys. I said there was no point in arguing over the past; that I wanted to work out the arrangements for where we went from here. One of the Montgomerys asked me about Fenwal's plans for selling on the West Coast. I told them we were considering setting up a Los Angeles office. Further than that the plans had not been formulated. Mr. W. R. Montgomery asked whether the Montgomery Brothers could continue to represent us in the northern part of the West Coast. I said I would be willing to discuss that possibility with them, but I was out here to

clean up the termination matters first. Fred Montgomery said that they had various suggestions for provisions for an agreement for working out the termination problems. I said I would submit these suggestions to Dr. Walter. Later on I told Montgomery Brothers that Dr. Walter would write them a letter, in substance adopting the Montgomery terms and specifying the provisions for termination. I said that I suggest Ray Montgomery visit the major accounts in the Los Angeles area to work out the transition from the Montgomery Brothers to Fenwal in handling those accounts so that our customers would not be involved in the clean-up work between Fenwal and Montgomery.

During this conversation the Montgomery brothers said that Ed Hawkins had resigned and they understood that he was going to work for Fenwal in the prospective Los Angeles office. I said that we had made no arrangements with Hawkins and we had not even invited him to enter our employ. I also said that I intended to see Hawkins and to discuss with him such a possibility. To this statement neither of the Montgomery brothers, as far as I can remember, made any answer or comment.

8. Yes.

9. Yes.

10. These conferences extended over a good part of two days and a good part of the Los Angeles territory and ended up in the Savoy Hotel. Prior to the meeting in the Savoy Hotel Hawkins, Ray Montgomery and myself were present from time to

time and others were present from time to time. In the Savoy Hotel just Hawkins, Ray Montgomery and myself were present.

11. Yes—sometime during the San Francisco conference.

12. To the best of my recollection, the conversation was as follows:

During this conversation the Montgomery brothers said that Ed Hawkins had resigned and they understood that he was going to work for Fenwal in the prospective Los Angeles office. I said that we had made no arrangements with Hawkins and we had not even invited him to enter our employ. I also said that I intended to see Hawkins and to discuss with him such a possibility. To this statement neither of the Montgomery brothers, as far as I can remember, made any answer or comment.

13. Yes—during the conference in San Francisco.

14. To the best of my recollection, during the talk about Dr. Walter's letter of January 20th, in substance one of the Montgomery brothers said isn't there some reason other than those expressed in the letter and I said I am not here to discuss the reasons.

15. Nothing that I recall at the present time.

16. To the best of my recollection, Fenwal told and wrote Montgomery Brothers from time to time concerning items of dissatisfaction.

17. I think it was around that time.

18. Just W. R. Montgomery and myself. To the best of my recollection, in substance, Mr. W. R. Montgomery gave me orally a list of the items that he wanted me to report to Mr. Robinson, our Sales Manager who handled the Montgomery accounts. I don't remember the details of the items.

19. No.

20. No answer required.

21. On January 1, 1949.

22. This conversation was by telephone. To the best of my recollection, the substance was: Mr. Hawkins said he was calling from his home in Los Angeles. He said he had heard of the termination of Fenwal's contract with Montgomery Brothers. He asked if he could have the job of representing Fenwal in Los Angeles. I said that I have nothing to discuss along those lines at the present time.

23. Myself.

24. The first week of February, 1949.

25. Yes.

26. While in Los Angeles around January 27, 1949, the information was given orally to W. Ray Montgomery.

27. Not that I remember.

28. To the best of my recollection, the substance of the conversation was as follows:

One of the Montgomery brothers said that they felt they were entitled to full profit on every single

order they could place with us up to the end of the termination period. I said that it was Mr. W. J. Turenne's understanding when the agreement was originally drawn that Montgomery Brothers, when cancelled upon 60 day notice, were through on the 60th day and were not entitled to any further profits; that Mr. Turenne had told me that the agreement was drawn with the express understanding that termination in 60 days meant just what it said with reference to business between Montgomery Brothers and Fenwal. I then said that I would propose, however, that on all orders placed by them which we had acknowledged that they would receive full profit; that on all further orders which were placed with us up to the end of the termination period and shipped within that period, they would also receive full profit; that what I wished to negotiate with them is the adjustment of profits on orders placed after January 1 for delivery thereafter. The result of this conversation was a proposal by Mr. Fred Montgomery which was later reduced to writing in Dr. Walter's letter of February 4.

29. Yes.

30. The discussion about the terms contained in this paragraph is included in the discussion reported in my answer to Interrogatory No. 28.

31. No.

32. No answer required.

33. I have stated the substance of all that I

recall at this time as having been said at the conference in San Francisco.

33a. No. I had discussions over the telephone with Fenwal regarding proposal made by the Montgomery Brothers which was later incorporated in Dr. Walter's letter of February 4, 1949.

34. Yes.

35. Following the conference on January 24 in San Francisco I went to Los Angeles and had further conferences with W. R. Montgomery commencing January 27th.

36. Yes.

37. January 27, 1949.

38. Myself, and most of the time W. R. Montgomery, and some of the time Edgard Hawkins and possibly others whose names I don't remember.

39. To the best of my recollection, the substance of the conversation was:

I said Fenwal has employed Hawkins to handle a Los Angeles office that Fenwal would open shortly and that I wanted to work out with Montgomery Brothers procedures for the transition period. Mr. Montgomery said that Montgomery Brothers would work out arrangements with Hawkins for the completion of Hawkins' work with them.

There were many conversations about the details of open accounts and customers, which I do not remember at the present time.

40. I went with W. Ray Montgomery to the

Douglas Aircraft Co. on the afternoon of January 27th or 28th. Frederick H. Montgomery was not present.

41. To the best of my recollection, from time to time during the conversation at Douglas Aircraft Co. there were present: myself, Mr. W. R. Montgomery, Mr. Edgar Hawkins, Mr. Dorn and Mr. Ferguson. To the best of my recollection, the substance of the conversation was as follows:

Mr. Montgomery said to Mr. Dorn that Fenwal was taking over the handling of the business with Douglas and that everybody wanted to make the transition as smooth as possible for the customers. He said that Fenwal would be in touch with Douglas later on.

42. I don't remember.

43. Yes.

44. These conferences were either on January 27 or January 28th. To the best of my recollection, those present were myself, Mr. W. Ray Montgomery, Mr. Edgar Hawkins and representatives of North American Aircraft and Lockheed Aircraft respectively. To the best of my recollection, the substance of the conversation was as follows:

Mr. Montgomery said to the representatives of North American Aircraft and Lockheed Aircraft respectively that Fenwal was taking over the handling of the business with those companies and that everybody wanted to make that transition as smooth as possible for the customers. He also said that Fenwal would be in touch with them later on.

45. No.

46. No answer required.

47. Yes.

48. To the best of my recollection, the substance of the conversation was as follows:

At this conference Mr. Montgomery said that he had been in contact with his brother and that they wanted to reopen certain considerations. He said that they wanted to see the contract we would offer regarding the northern section of the Pacific territory before acceding to the termination agreement, and he outlined a number of details in which he wanted the conditions to be changed in his favor. I said to W. Ray Montgomery that I felt that they were definitely breaking an agreement reached in good faith in San Francisco. I said that we had developed an agreement in San Francisco which I was executing to the letter, and now he had new demands and was not honoring the previous agreement. I told him further that the points covered with me by Fred Montgomery had been translated verbatim as a basis of agreement to Fenwal, Inc.; that a letter was being issued by Dr. Walter on the basis of those points. I said that I certainly did not think that they were being either fair or acting in good faith when they accept an agreement in San Francisco and then disavow that agreement by bringing up new points and pressing for greater advantage. Mr. Montgomery then said that the summary of agreement presented to me by Fred Montgomery was no basis for agreement at all; that

they merely presented it as a basis of argument and had changed their minds. He then outlined certain demands for larger discounts on small orders; he said that they would not agree to any termination arrangement without seeing the final new contract. I said that I would make no new commitments; that I had already gone further than I should have; that our letter on the termination agreement would stand; and that I would consider his new demands but that he must recognize that the proposed contract must be in line with other representatives' contracts and that I would not commit myself on the new demands. I said that Dr. Walter's letter would soon be in their hands.

49. At some time there was a discussion about Boeing, the substance of which, to the best of my recollection, was as follows:

Mr. Montgomery asked if they would be allowed to continue to handle Boeing. I told them that I did not know but that if that took place, Boeing's orders would have to be made out to Fenwal and their (Boeing's) orders would have to be handled direct through the Montgomery Seattle office to Fenwal without going through the Montgomery office in San Francisco.

50. I don't remember.

51. No.

52. I had told Mr. W. Ray Montgomery.

53. Yes.

54. I attach copies of letters of May 20, 1947,

and June 20, 1947. There may be others which I have not located.

55. I have a financial statement of Fenwal, Incorporated, for December 31, 1948.

56. A copy is attached.

57. Yes.

58. Yes.

59. I saw Mr. W. Ray Montgomery in various places in the Los Angeles area and had many conversations with him over the three-day period of March 9, 10 and 11, 1949. Various people were present from time to time. To the best of my recollection, the substance of the conversation with Mr. W. R. Montgomery was as follows:

I said that I had come to Los Angeles to free the unfilled orders so that our customers could get service. Mr. Montgomery asked what was the best thing to do about the customers' accounts. I said that Montgomery Brothers should immediately assign to Fenwal every open order on the West Coast and that we would agree that such an assignment would be without prejudice to whatever claims, if any, Montgomery Brothers might have against Fenwal. Mr. Montgomery said that would be satisfactory to him. We announced our arrangement to our customers.

Towards the end of the discussions Mr. W. Ray Montgomery asked me to go to San Francisco and to see his brother, Fred, to attempt to work out

some of our mutual problems. I said that I would go to see Fred in San Francisco.

60. Intermittently.

61. Mr. Robinson was and is our Sales Manager.

62. Yes.

63. See answer to Interrogatory No. 59.

64. I saw Mr. Montgomery in Los Angeles on various occasions over the period, I believe, of March 9, 10 and 11, 1949.

65. See answer to Interrogatory No. 59.

66. See answer to Interrogatory No. 59.

67. As I remember it, we called on Lockheed, Northrop, Douglas, North American, Boeing, and probably some others that I do not remember. I do not remember just who was present at each of these visits other than Mr. W. Ray Montgomery and myself. To the best of my recollection, the substance of the conversation was:

Mr. Montgomery asked the customer's representative to assent to an assignment to Fenwal by Montgomery Brothers of all open orders. In each instance the representative of the aircraft plant said Yes.

68. Yes.

69. See copies attached.

70. Yes.

71. Yes.

72. Mr. Fred Montgomery and I were present and, to the best of my memory, Mr. Robinson was present for part of the discussions. Maybe some others were present from time to time but I do not remember.

To the best of my recollection, the substance of the conversation was as follows:

Mr. Fred Montgomery asked what we wanted to do about the large number of orders that we had returned to him unaccepted; that they were small orders and in the aggregate did not amount to much; that they were too small to bother with the assignment procedures. I suggested that Fenwal would take care of those customers as promptly and expeditiously as possible and that we would make shipments on them if we had a guarantee from some bank that the payments would be made on them.

Mr. Montgomery in my presence telephoned a bank. At the end he turned to me and said that the bank would give me a letter of guarantee.

I said that Fenwal would fill all orders in his hands at the price to be paid by the customer. Mr. Montgomery said that this would be satisfactory.

Mr. Montgomery asked about the small orders which would continue to come into their office from then on. I said that we would honor these orders under the bank guarantee until Fenwal would decide what we were going to do about the entire affair.

I asked Mr. Montgomery what his best terms were for settling the whole affair. He told me that he wanted all the profit that they would normally receive under the contract to the completion of all

orders on hand. I said that they were not entitled to their normal profit because they were no longer performing the functions of a representative including credit collections, service, adjustments, etc. Mr. Montgomery said that they would offer to settle the entire affair upon the basis of Fenwal agreeing to pay Montgomery Brothers the normal commission less five per cent (5%) off on unfilled orders. I said that offer was not reasonable but that I would submit it to the people at home.

/s/ J. M. STORKERSON.

Commonwealth of Massachusetts,
Suffolk—ss.

Boston, Mass.

March 10, 1950.

'Then personally appeared the above-named J. M. Storkerson and made oath that the foregoing answers were true to the best of his recollection and belief.

/s/ ANTHONY BRAYTON,
Notary Public.

Inter-Office Correspondence

From

Montgomery Brothers
San Francisco 3

May 20, 1947

To: Fenwal, Inc.

Subject: Account.

Attention: Mr. A. C. Drew, Comptroller

Dear Mr. Drew:

We are attaching hereto our check covering April invoices in the amount of \$10,184.92. Also, replying to your letter of May 16th, we are attaching hereto copies of our remittance advice covering our payment of \$19,190.24.

At the time we sent you our check, we attached copies showing what our payment covered. However, same must have been detached before this reached your desk.

Regarding the second paragraph of your letter of May 16th, we are adding the \$17.10 to our remittance of today.

From the copies of your statements, which we are attaching, covering our payment of \$19,190.24, from which we took 1% cash discount that you are objecting to, if you will refer to these statements you will see that on December 31st you owed us \$22,687.79, in January you owed us \$16,183.98, and in February you owed us \$13,371.62.

We wrote you on January 16th asking that you please send us a check in order to balance the account, as we needed the money at that time to pay

taxes, etc. However, according to Mr. Robinson's letter, you were not in a position to do so. Therefore, we were obliged to let this account stand, and we feel perfectly justified now in taking the discount of \$191.90.

We religiously pay all our accounts on the 10th of the month. If we could get your invoices rendered correctly with the correct discount, and also if we could get a statement from you each month by the 10th of the month, we would have your check in the mail every month on the night of the 10th. For instance, the last statement we received from you was for January, February and March. This was not sent us until we requested same. Before that we had not received a statement from you since October. You can readily understand how hard it is to check your account unless we receive your statement each month.

We also note in the third paragraph of your letter of May 16th you are questioning some of the deductions we made, as follows:

Invoice #7-481	\$64.75
" #7-523	64.75
" #7-1375	64.75

If you will refer to your latest discount schedules on switches in quantities from 1,000 to 2,499, your discount is 50 and 5%. That is the discount which we must give our manufacturers. We as representatives receive an additional 15%. Therefore, your invoices were rendered less 50 and 10%, whereas they should have been less 50-5-15%. There

is, therefore, credit due us on these three invoices of \$64.75 each. This also applies to Invoice #7-2358. There is a credit of \$34.75 due us on that, as this applies to the same purchase order.

The following are also corrections made on your invoices, deductions which we have taken, and we should receive your credit memorandum for these amounts:

Invoice #7-1083: The correct price of these switches is \$9.50 and not \$11.00, as you show on your invoice. There is, therefore, a credit due us of \$35.70. We refer you to Mr. E. B. Pierce's letter of February 19th substantiating this price.

Invoice #7-2454	Less 20%	Credit due	\$.06
" #7-2861	"	"	26.10
" #7-2862	"	"	8.70
" #7-2863	"	"	26.10
" #7-2864	"	"	26.10
" #7-2961	"	"	17.40
" #7-2962	"	"	52.20
" #7-2963	"	"	52.20
" #7-2964	"	"	52.20

There is one old item of November 29, 1945, Invoice #5-8379, of which you still show that we owe you \$248.20. This is definitely not correct. If you will refer to the invoice, you will see you have charged us \$9.25 for S-2223 Thermoswitch. In the past two years we have purchased thousands of S-2223 from you, and our price has always been \$8.40, less 20%.

When you rendered this invoice in 1945, you

showed a price of \$9.25, less 50 and 10%. Your invoice called for \$1,519.31. It is regrettable that we did not pay your invoice as you rendered it, thereby closing the matter out. However, in our honesty we paid you the invoice in the correct amount of \$8.40 each, less 20%, paying you the amount of \$2,452.80. We would have saved \$933.49 had we not corrected your error. If \$9.25 was the correct price for an S-2223 Thermoswitch, we are wondering why you only allowed us \$8.40 on all the returns that Lockheed made, when we should have gotten credit for \$9.25. Please review your files on this, and delete this old balance of \$248.20 from our account.

With our payment today, we feel that our account is paid in full to May 1st. We also hope that you will see your way clear to send us your statement each month so we can have it by the 10th of the month, and we will see that your check gets in the mail that night.

Very truly yours,

MONTGOMERY BROTHERS.

RJP:is

cc Accounting Dept.

June 20, 1947

From

Montgomery Brothers
San Francisco 3

To: Fenwal, Inc.

Subject: Account

Attention: A. C. Drew, Controller.

Dear Mr. Drew:

We wish to thank you for your letter of June 13th, and are very happy to note that we are getting some of the old charges which you have been showing against our account straightened up. We also wish to advise that our check for the May account was mailed you, as promised, on June 10th, in amount of \$42,438.52. We also wish to state that we will continue to send our check promptly on the 10th of the month if you will see that your statement is mailed to us in time for us to check the bills by that time.

Regarding our Debit Memo 264, we are attaching hereto our Credit 341 cancelling this Debit Memo. However, our Debit Memo 265 we regret we are unable to cancel. We requested this by Railway Express. However, you shipped it Air Express, which was not authorized by us or our customer. Therefore we cannot allow this amount. Air Express amounted to \$4.91, and Railway Express on 6 pounds would be \$1.03. Therefore we feel that the difference of \$3.88 should be paid by you.

Our Debit Memo 307 was also shipped by Air

Express, which should have been shipped Railway Express. This refers to our P. O. 24667, your S-21992, covering shipment of July 31, 1945, to the Lockheed Aircraft Corporation. For your convenience, we are attaching hereto copy which was sent to you in May of this year.

Regarding the material returned on Debit Memo 294 and 295, we have contacted our Los Angeles office as to how and when this material was shipped. We will put a tracer on same, and advise you of our findings.

Trusting that you will check into these remaining Debit Memos and be able to issue us credit as requested, we are

Very truly yours,

MONTGOMERY BROTHERS.

RJR:is

cc Accounting Dept.

Fenwal Incorporated
Ashland, Massachusetts
Balance Sheet at December 31, 1948

Assets	
Cash	\$ 66,068.95
Cash Advances—Drawing Account	160.00
Accounts Receivable	\$107,779.77
Less—Reserve for Sales Returns	8,508.40
	99,271.37
Inventories	130,123.44
Total Current Assets	\$295,623.76
Fixed Assets (Depreciated Value)	121,852.73
Patent Rights	50,000.00
Prepaid Expenses	8,896.62
	\$476,373.11

Fenwal Incorporated
Ashland, Massachusetts
Balance Sheet at December 31, 1948

Liabilities	
Accounts Payable	\$ 9,739.23
Notes Payable—Miscellaneous	11,086.07
Accrued Payroll	—0—
Payroll Taxes and Deductions	4,846.59
Prior Years' Federal Income Taxes and Interest.....	63,319.73
1948 Federal Income Taxes	21,794.51
Massachusetts Income and Local Taxes	5,059.97
Accrued Expenses (Monies due Officers, Commissions)	28,632.77
Employees' Profit Sharing	20,087.78
Interest	3,014.76
Insurance	1,041.96
Sales Taxes	2.65
 Total Current Liabilities	 \$168,626.02
First Mortgage Payable—Due October 1, 1953.....	79,468.43
Capital Stock	\$100,000.00
Surplus, December 31, 1948	128,278.66 228,278.66
 Total Liabilities	 \$476,373.11

Note: A claim has been made by General Accounting Office U. S. Government for excessive royalties paid in the years 1944 and 1945 in the amount of \$17,364.25. If this claim is sustained the cost to the corporation, after adjustment for federal income taxes paid, will be \$13,267.41.

2113 South San Pedro Street
Zone 11

March 10, 1949

Lockheed Aircraft Corporation
Burbank,
California

Attention: Mr. J. V. McCheeney

Subject: Assignment of Fenwal Thermoswitches on
Orders with Montgomery Brothers to
Fenwal Incorporated.

Gentlemen:

Montgomery Brothers and Fenwal Incorporated

have agreed to an assignment by Montgomery Brothers in favor of Fenwal Incorporated of the unshipped balances on the following Lockheed Purchase Orders:

Lockheed Purchase Orders

33-23783	33-23714	33-23771	29-06653
33-26778	33-23715	33-13299	29-06654
33-26781	33-23786	33-10182	
33-26430	33-21098	33-10183	
33-20601	33-05066	33-13298	
33-23782	33-23713	33-23789	
33-05058	33-23712	33-11478	
33-05055	33-18415	33-11479	
33-23785	33-11414	33-13901	
33-23784	33-16414	33-23791	
33-31897	33-13290	33-23790	
		33-26780	

The name of the seller under the above-purchase orders covering the quantities of the unshipped balances shown above should be changed from Montgomery Brothers to Fenwal Incorporated. Fenwal Incorporated will agree to assume all of the obligations of Montgomery Brothers under the subject orders and in the amounts referred to above and will perform and comply with all of the terms and conditions thereof.

It is understood that the Lockheed Aircraft Corporation will receive shipments of the unfilled balances on these orders direct from Fenwal Incorporated and that they will be billed by Fenwal Incorporated and make payment to them. Any

rejections or reworks will be handled by Fenwal Incorporated.

The Lockheed Aircraft Corporation agrees to send to Montgomery Brothers a copy of any and all change orders that may be issued against these assigned orders and if any of these are cancelled and a new order issued for a new Fenwal product to be used in place of the Fenwal product called for in any of these assigned orders, Montgomery Brothers are to be given a copy of the new order with the price of the new product as shown thereon.

/s/ W. RAY MONTGOMERY,
Montgomery Brothers.

/s/ J. M. STORKERSON,
Fenwal Incorporated.

2113 South San Pedro Street
Zone 11

March 10, 1949

Boeing Aircraft Company
Seattle, Washington

Attention: Mr. Frank L. Dobbins

Subject: Assignment of Fenwal Thermoswitches
on orders with Montgomery Brothers to
Fenwal Incorporated.

Gentlemen:

Montgomery Brothers and Fenwal Incorporated have agreed to an assignment by Montgomery Brothers in favor of Fenwal Incorporated of all orders now entered on Montgomery Brothers for Fenwal products.

It is suggested that the name of the seller on all purchase orders which now read Montgomery Brothers should be changed to Fenwal Incorporated by change notice with copies to both Montgomery Brothers and Fenwal. In order to complete Fenwal records it will be necessary for them to have a copy of the original orders to be used with the above change notice.

Fenwal Incorporated will agree to assume all of the obligations of Montgomery Brothers under the subject purchase order and will perform and comply with the terms and conditions thereof.

It is understood you will receive shipments of the unfilled balances on these orders direct from Fenwal Incorporated and will be billed by Fenwal Incorporated and make payment to them. Any rejections or reworks will be handled by Fenwal Incorporated.

The Boeing Aircraft Company agrees to send to Montgomery Brothers a copy of any and all change orders that may be issued against these assigned orders and if any of these are cancelled and a new order issued for a new Fenwal product to be used in place of the Fenwal product called for in any of these assigned orders, Montgomery Brothers are to be given a copy of the new order with the price of the new product as shown thereon.

If the assignment of these orders by Montgomery Brothers in favor of Fenwal Incorporated is satisfactory to your company we ask that you acknowledge on the attached two copies as indicated below and submit one copy to Fenwal Incorporated, Ash-

land, Massachusetts, and the other copy to Montgomery Brothers, 1122 Howard Street, San Francisco 2, California, that said assignment is accepted by you.

/s/ W. RAY MONTGOMERY,
Montgomery Brothers.

/s/ J. M. STORKERSON,
Fenwal Incorporated.

Date:

Accepted:
Boeing Aircraft Company.

2113 South San Pedro Street
Zone 11

March 10, 1949

AiResearch Mfg. Company
9851 Sepulveda Blvd.
Los Angeles 45, California

Attention: Mr. P. Sorella—Buyer.

Subject: Assignment to Fenwal Thermoswitches
on orders with Montgomery Brothers to
Fenwal Incorporated.

Gentlemen:

Montgomery Brothers and Fenwal Incorporated have agreed to an assignment by Montgomery Brothers in favor of Fenwal Incorporated of all orders now entered on Montgomery Brothers for Fenwal products.

It is suggested that the name of the seller on all

purchase orders which now read Montgomery Brothers should be changed to Fenwal Incorporated by change notice with copies to both Montgomery Brothers and Fenwal. In order to complete Fenwal records it will be necessary for them to have a copy of the original orders to be used with the above change notice.

Fenwal Incorporated will agree to assume all of the obligations of Montgomery Brothers under the subject purchase order and will perform and comply with the terms and conditions thereof.

It is understood you will receive shipments of the unfilled balances on these orders direct from Fenwal Incorporated and will be billed by Fenwal Incorporated and make payment to them. Any rejections or reworks will be handled by Fenwal Incorporated.

The AiResearch Manufacturing Company agrees to send to Montgomery Brothers a copy of any and all change orders that may be issued against these assigned orders and if any of these are cancelled and a new order issued for a new Fenwal product to be used in place of the Fenwal product called for in any of these assigned orders, Montgomery Brothers are to be given a copy of the new order with the price of the new product as shown thereon.

If the assignment of these orders by Montgomery Brothers in favor of Fenwal Incorporated is satisfactory to your company we ask that you acknowledge on the attached two copies as indicated below and submit one copy to Fenwal Incorporated, Ashland, Massachusetts, and the other copy to Mont-

gomery Brothers, 1122 Howard Street, San Francisco 2, California, that said assignment is accepted by you.

/s/ W. RAY MONTGOMERY,
Montgomery Brothers.

/s/ J. M. STORKERSON,
Fenwal Incorporated.

Date:

Accepted:
AiResearch Mfg. Company.

March 10, 1949

Douglas Aircraft Co., Inc.
Santa Monica, California

Attention: Mr. W. G. Doran.

Subject: Assignment of Fenwal Thermoswitches
on orders with Montgomery Brothers to
Fenwal Incorporated.

Gentlemen:

Montgomery Brothers and Fenwal Incorporated have agreed to an assignment by Montgomery Brothers in favor of Fenwal Incorporated of all orders now entered on Montgomery Brothers for Fenwal products.

It is suggested that the name of the seller on all purchase orders which now read Montgomery Brothers should be changed to Fenwal Incorporated by change notice with copies to both Montgomery Brothers and Fenwal. In order to complete

Fenwal records it will be necessary for them to have a copy of the original orders to be used with the above change notice.

Fenwal Incorporated will agree to assume all of the obligations of Montgomery Brothers under the subject purchase order and will perform and comply with the terms and conditions thereof.

It is understood you will receive shipments of the unfilled balances on these orders direct from Fenwal Incorporated and will be billed by Fenwal Incorporated and make payment to them. Any rejections or reworks will be handled by Fenwal Incorporated.

The Douglas Aircraft Co., Inc., agrees to send to Montgomery Brothers a copy of any and all change orders that may be issued against these assigned orders and if any of these are cancelled and a new order issued for a new Fenwal product to be used in place of the Fenwal product called for in any of these assigned orders, Montgomery Brothers are to be given a copy of the new order with the price of the product as shown thereon.

If the assignment of these orders by Montgomery Brothers in favor of Fenwal Incorporated is satisfactory to your company we ask that you acknowledge on the attached two copies as indicated below and submit one copy to Fenwal Incorporated, Ashland, Massachusetts, and the other copy to Montgomery Brothers, 1122 Howard Street, San

Francisco 2, California, that said assignment is accepted by you.

/s/ W. RAY MONTGOMERY,
Montgomery Brothers.

/s/ J. M. STORKERSON,
Fenwal Incorporated.

Date:

Accepted:
Douglas Aircraft Co., Inc.

2113 South San Pedro Street
Zone 11

March 11, 1949

North American Aviation, Inc.
Municipal Airport
Los Angeles 45, California

Attention: Mr. Hulen Nagley,
Purchasing Agent.

Subject: Assignment of Fenwal Thermoswitches
on Orders with Montgomery Brothers
to Fenwal Incorporated.

Gentlemen:

Montgomery Brothers and Fenwal Incorporated have agreed to an assignment by Montgomery Brothers in favor of Fenwal Incorporated of all orders now entered on Montgomery Brothers for Fenwal products.

It is suggested that the name of the seller on all purchase orders which now read Montgomery

Brothers should be changed to Fenwal Incorporated by change notice with copies to both Montgomery Brothers and Fenwal. In order to complete Fenwal records it will be necessary for them to have a copy of the original orders to be used with the above change notice.

Fenwal Incorporated will agree to assume all of the obligations of Montgomery Brothers under the subject purchase order and will perform and comply with the terms and conditions thereof.

It is understood you will receive shipments of the unfilled balances on these orders direct from Fenwal Incorporated and will be billed by Fenwal Incorporated and make payment to them. Any rejections or reworks will be handled by Fenwal Incorporated.

The North American Aviation, Inc., agrees to send to Fenwal Incorporated a duplicate copy for Montgomery Brothers of any and all change orders that may be issue dagainst these assigned orders and if any of these assigned orders are cancelled and a ne worder issued for a new Fenwal product to be used in place of the Fenwal product called for in any of these assigned orders, North American is to issue a duplicate copy of their purchase order to Fenwal Incorporated for Montgomery Brothers.

If the assignment of these orders by Montgomery Brothers in favor of Fenwal Incorporated is satisfactory to your company we ask that you acknowledge on the attached two copies as indicated below and submit one copy to Fenwal Incorporated, Ash-

land, Massachusetts, and the other copy to Montgomery Brothers, 1122 Howard Street, San Francisco 2, California, that said assignment is accepted by you.

/s/ W. RAY MONTGOMERY,
Montgomery Brothers.

/s/ J. M. STORKERSON,
Fenwal Incorporated.

Date:

Accepted:

North American Aviation, Inc.

2113 South San Pedro Street
Zone 11

March 11, 1949

Northrop Aircraft, Inc.
Northrop Field
Hawthorne, California

Attention: Mr. J. G. Hebard.

Subject: Assignment of Fenwal Thermoswitches
on Orders with Montgomery Brothers to
Fenwal Incorporated.

Gentlemen:

Montgomery Brothers and Fenwal Incorporated have agreed to an assignment by Montgomery Brothers in favor of Fenwal Incorporated of all orders now entered on Montgomery Brothers for Fenwal products.

It is suggested that the name of the seller on all

purchase orders which now read Montgomery Brothers should be changed to Fenwal Incorporated by change notice with copies to both Montgomery Brothers and Fenwal. In order to complete Fenwal records it will be necessary for them to have a copy of the original orders to be used with the above change notice.

Fenwal Incorporated will agree to assume all of the obligations of Montgomery Brothers under the subject purchase order and will perform and comply with the terms and conditions thereof.

It is understood you will receive shipments of the unfilled balances on these orders direct from Fenwal Incorporated and will be billed by Fenwal Incorporated and make payment to them. Any rejections or reworks will be handled by Fenwal Incorporated.

The Northrop Aircraft, Inc., agrees to send to Montgomery Brothers a copy of any and all change orders that may be issued against these assigned orders and if any of these are cancelled and a new order issued for a new Fenwal product to be used in place of the Fenwal product called for in any of these assigned orders, Montgomery Brothers are to be given a copy of the new order with the price of the new product as shown thereon.

If the assignment of these orders by Montgomery Brothers in favor of Fenwal Incorporated is satisfactory to your company we ask that you acknowledge on the attached two copies as indicated below and submit one copy to Fenwal Incorporated, Ashland, Massachusetts, and the other copy to Mont-

gomery Brothers, 1122 Howard Street, San Francisco 2, California, that said assignment is accepted by you.

/s/ W. RAY MONTGOMERY,
Montgomery Brothers.

/s/ J. M. STORKERSON,
Fenwal Incorporated.

Date:

Accepted:
Northrop Aircraft, Inc.

March 9, 1949

Montgomery Brothers
1122 Howard Street
San Francisco 3, California

Gentlemen:

It is understood and agreed by and between Montgomery Brothers and Fenwal Incorporated that Montgomery Brothers in assigning to Fenwal Incorporated any and all unfilled orders for Fenwal products that it does not constitute a waiver of any of the rights of either Montgomery Brothers against Fenwal Incorporated or Fenwal Incorporated against Montgomery Brothers, arising out of contracts between them.

/s/ J. M. STORKERSON,
Fenwal Incorporated.

Date: March 10, 1949.

/s/ W. RAY MONTGOMERY,
Montgomery Brothers.

Date: March 10, 1949.

Receipt of Copy Acknowledged.

[Endorsed]: Filed March 17, 1950.

[Title of District Court and Cause.]

INTERROGATORIES DIRECTED TO C. W.
WALTER AND ANSWERS TO INTER-
ROGATORIES

To: McCutchen, Thomas, Matthew, Griffiths &
Greene, and Felix F. Stumpf, Esq., Attorneys
for Plaintiff and Cross-Defendant Fenwal In-
corporated, a Corporation:

Pursuant to the provisions of Rule 33 of the
Federal Rules of Civil Procedure, the defendants
herein address to the plaintiff Fenwal, Incorporated,
the following interrogatories to be answered
separately, fully and under oath by C. W. Walter,
President of Fenwal, Incorporated:

1—Q. Are you an officer of Fenwal, Incorporated,
a corporation? A. Yes.

2—Q. If so, what office do you hold, and did
you occupy this office in the months of October,
November and December, 1948, and January, Feb-
ruary and March, 1949?

A. I have been President continuously since
1943.

3—Q. Do you know Edgar V. Hawkins?

A. Yes.

4—Q. When did you meet Edgar V. Hawkins?

A. May 20, 1948.

5—Q. Did you have a conversation with Edgar
V. Hawkins in the City of Los Angeles, California,
in the month of September, 1948? A. Yes.

6—Q. If your answer to the foregoing interroga-

tory is yes, where was the conversation held, who was present at the conversation, and what was said by all parties who participated in the conversation?

A. We met in Pierres' Restaurant in San Marino in September, 1948. Our wives and four of our children were present.

To the best of my recollection, the substance of the conversation was as follows:

The social conversation was irrelevant.

We discussed the arrangements for a visit to the Lockheed plant for Dr. Charles Hufuagel, a colleague, and myself.

I asked if he had developed any suggestions for the improvement of Fenwal's service to its customers or means of obtaining better representation to industry as a whole. I stated that Fenwal was dissatisfied with the post-war sales trend in West Coast business and stated that greater effort must be expended in obtaining industrial, in contradistinction to aircraft, business.

Hawkins stated that little could be accomplished to obtain these ends under Montgomery Brothers' policy. He said there was discontent within the Montgomery organization which had reached the point that he and others were planning to leave no later than March 1, 1949. He mentioned tentative plans they had to set up as manufacturers' representatives and said that they were looking for accounts. I asked him for details, but he said he could say nothing until he had discussed matters further with the others. I said that Fenwal would entertain a proposal from the new group, but that

personally I thought the company would be interested in learning about the desirability of a factory office in Los Angeles. Hawkins said he was surprised at that, and the remainder of the conversation was about the relative merits of a factory office and a sales agency in the Los Angeles area, the details of which I do not remember.

7—Q. Did you have any other conversation with Edgar V. Hawkins in Los Angeles during 1948 and after September, 1948? A. Yes.

8—Q. If your answer to the foregoing interrogatory is yes, where did that conversation take place, who was present, and to the best of your recollection what was said by each person who was present?

A. After a trip through the Lockheed plant, Dr. Hufuagle, Hawkins, and I had dinner together and later retired to Dr. Hufuagle's room at the Hotel San Carlos.

To the best of my recollection, the substance of the conversation was as follows:

Hawkins asked me to tell him about Fenwal's set-up and policies. I told him facts which were known by Fenwal's employees and by commercial credit agencies, but I do not remember the details. There was some further discussion of the type of sales representation in Los Angeles which might be adopted by Fenwal, but I do not remember the details. I had no further conversation with Mr. Hawkins in Los Angeles during 1948.

9—Q. Did you at any time ever offer to employ Edgar V. Hawkins on behalf of Fenwal, Incorpo-

rated, either as a manager, representative or employee? A. No.

10—Q. If your answer to the foregoing interrogatory is yes, state when and where said conversation was had and what was said by you and by Edgar V. Hawkins?

A. None required.

11—Q. Is there any correspondence in existence between Fenwal, Incorporated, and Edgar V. Hawkins, or copies thereof wherein the matter of employment of said Edgar V. Hawkins is referred to?

A. No.

12—Q. If there is such correspondence or copies thereof, kindly attach correspondence or copies thereof to your reply to these interrogatories.

A. None required.

[Interrogatories:]

CHRISTIN, KEEGAN &
CARROLL,

By /s/ CHARLES A. CHRISTIN,
Attorneys for Defendants.

[Answers to Interrogatories:]

/s/ CARL W. WALTER.

Commonwealth of Massachusetts,
Suffolk—ss.

Boston, Mass.,
March 11th, 1950

Then personally appeared the above-named C. W. Walter and made oath that the foregoing answers

were true to the best of his recollection and belief.

[Seal] /s/ ANNIE P. THURSTON,
Notary Public.

Receipt of Copy acknowledged.

Interrogatories endorsed and filed March 1, 1950.

Answers endorsed and filed March 20, 1950.

[Title of District Court and Cause.]

STIPULATION

1. That the amount due from defendant and cross-complainant to plaintiff for shipments made in January and February, 1949, less credits for merchandise returned, is \$46,635.40.

2. That the amount to which defendant and cross-complainant, Montgomery Brothers, would be entitled if profit were allowed on all orders is \$36,525.20, less profit on such orders as may be cancelled by the purchaser.

3. That the amount to which said defendant and cross-complainant would be entitled if profit were allowed on all shipments made up to the effective date of termination is \$0, since profit was obtained on all such shipments.

4. That the amount to which said defendant and cross-complainant would be entitled if profit were allowed on all orders accepted prior to the effective

date of termination for delivery thereafter is \$17,-
361.46, less profit on such orders as may be can-
celled by the purchaser.

Dated: July 14, 1950.

/s/ MORRIS M. DOYLE,

/s/ FELIX F. STUMPF,

McCUTCHEON, THOMAS,

MATTHEWS GRIFFITHS &
GREENE,

Attorneys for Plaintiff and
Cross-Defendant.

CHRISTIN, KEEGAN &
CARROLL,

By /s/ CHARLES A. KRISTIN,

Attorneys for Defendant and
Cross-Complainant.

[Endorsed]: Filed July 14, 1950.

[Title of District Court and Cause.]

MEMORANDUM RE PROPOSED JUDGMENT

First. The cross-complainant should be dismissed. In my view, defendants have not shown by a preponderance of the evidence that plaintiff "induced" Hawkins to leave defendants' employ.

Second. Strict application of the law of Sales, as contended for by plaintiff, seems harsh, and frankly, my leaning has been to find a way to avoid strict application of the rule.

I will be glad to consider letter memoranda, to be forwarded to me at Portland, on this proposition: Since the contract did not itself provide a formula for settlement of business developed during the termination period, the parties had either to agree on a formula, submit the matter to arbitration, or go to court. They endeavored to agree, and while the discussions were going on, defendants chose to withhold payment for January business. Plaintiff deemed this harsh, indeed, in its financial condition, unbearable, and broke off negotiations.

Did this deprive defendants of the right to call, as they are calling now, for a court evolved formula for construction of the termination clause? It seems to me not. I recognize the force of able counsel's contention that defendants "imposed a condition they had no right to impose"—namely, that defendants would not pay until the question of a new contract was settled. But the answer to that is, I feel, that the question of a new contract had be-

come an important part (despite Storkerson's initial efforts to keep it separate) of the settlement discussions.

As indicated, if counsel care to write me, either in support or criticism of what is here stated, I will wait a reasonable time, meanwhile treating the suggestions stated as tentative grounds for decision only.

Dated at San Francisco, California, this 20th day of July, 1950.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed July 20, 1950.

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

After consideration of the parties' letter arguments, which I appreciate, I feel that defendants are entitled to their profit on all orders accepted, on a quasi-contract basis—benefit to plaintiff.

Findings and form of judgment may be submitted.

Dated at Portland, Oregon, this 8th day of August, 1950.

/s! CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed August 10, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 11th day of July, 1950, before the above-entitled court, Honorable Claude McColloch presiding, sitting without a jury. Morris M. Doyle, Esq., and Felix S. Stumpf, Esq., appeared for plaintiff, and Charles A. Christin, Esq., appeared for defendants. Evidence, both oral and documentary, having been introduced and the court being fully advised in the premises, makes its findings of fact and conclusions of law as follows:

Findings of Facts

The court now finds as follows:

I.

That the allegations of paragraphs 1, 2, 3 and 4 of plaintiff's complaint on file herein are true, except that plaintiff did not reimburse defendant for sales made by defendant prior to said termination date and delivered by plaintiff subsequently thereto; that the allegations of paragraph I of defendants' answer are true.

II.

That it is true that defendants are indebted to plaintiff under the contract referred to in the complaint and answer for goods sold and delivered by plaintiff to defendants from January 1, 1949, through February 23, 1949, on orders placed by defendants with plaintiff, pursuant to said contract.

That pursuant to stipulation of the parties hereto filed herein on July 14, 1950, such indebtedness is the sum of \$46,635.40. That it is true that defendants have failed and refused to pay said sum or any part thereof although plaintiff demanded payment thereof.

III.

That the allegations of paragraph II of defendants' answer on file herein are untrue.

IV.

That it is true that certain orders were placed by defendants with plaintiff prior to February 28, 1949. That said orders were accepted by plaintiff, filled and delivered by said plaintiff after February 28, 1949, which resulted in a financial benefit to said plaintiff in that plaintiff realized a profit on the articles so sold and delivered, and further benefitted by the continuation of business between the plaintiff and the buyers thereof; that the services rendered by defendants in obtaining and filing of said orders with plaintiff were not gratuitously performed. That pursuant to the stipulation of the parties hereto filed July 14, 1950, the profits of defendants upon all orders obtained by the defendants and filled by the plaintiff would be \$36,525.20.

That said sum of \$36,525.20 represents the profits which defendants would make on the resale by defendants to their customers of goods shipped to said customers under orders placed by defendants with plaintiff prior to the effective date of termination of said contract and accepted by plaintiff. Shipments of said goods were made by plaintiff

to defendants' said customers under an assignment from defendants to plaintiff, which said assignment was made without waiving the rights of either defendants or plaintiff.

V.

That it is not true that plaintiff induced Edgar V. Hawkins to leave defendants' employ.

Conclusions of Law

From the foregoing facts, the court concludes:

1. That plaintiff is entitled to recover from defendants the sum of \$46,635.40 for goods sold and delivered by plaintiff to defendants.

2. That defendants are entitled to an offset against said sum of \$46,635.40 in the amount of \$36,525.20.

3. That the second ground of cross-complainant set forth in defendants' answer and cross-complaint be dismissed.

4. That plaintiff is entitled to judgment for \$10,110.20 with interest thereon from February 23, 1949, to the date of judgment herein at the rate of 6 per cent per annum. Costs to neither party.

Let judgment be entered accordingly.

Dated: September 4, 1950.

/s/ CLAUDE McCOLLOCH,
Judge of the United States
District Court.

[Endorsed]: Filed September 8, 1950.

United States District Court for the Northern
District of California, Southern Division

No. 28851-R

FENWAL, INCORPORATED, a Corporation,
Plaintiff,

vs.

W. RAY MONTGOMERY and FREDERICK H.
MONTGOMERY and MONTGOMERY
BROTHERS, a Partnership,
Defendants.

W. R. MONTGOMERY and FREDERICK H.
MONTGOMERY, Doing Business Under the
Firm Name and Style of MONTGOMERY
BROTHERS,

Cross-Complainants,

vs.

FENWAL, INCORPORATED,

Cross-Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on the 11th day of July, 1950, before the above-entitled court, Honorable Claude McColloch presiding, sitting without a jury. Morris M. Doyle, Esq., and Felix F. Stumpf, Esq., appeared for plaintiff and Charles A. Christin, Esq., appeared for defendants. Evidence, both oral and documentary, having been introduced and the court being

fully advised in the premises and having made its findings of fact and conclusions of law,

It is Hereby Adjudged:

1. That the plaintiff have and recover from defendants the sum \$10,110.20 with interest thereon at the rate of 6 per cent per annum from February 23, 1949, to the date hereof;

2. That the second ground of cross-complaint set forth in defendants' answer and cross-complaint on file herein be and the same is hereby dismissed;

3. Costs to neither party.

Dated: September 4, 1950.

/s/ CLAUDE McCOLLOCH,

Judge of the United States
District Court.

[Endorsed]: Filed September 8, 1950.

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To: Messrs. McCutchen, Thomas, Matthew, Griffiths & Greene, Attorneys, 1500 Balfour Building, San Francisco, Calif.

Messrs. Christin, Keegan & Carrol, Attorneys, Russ Building, San Francisco, Calif.

You are Hereby Notified that on September 11, 1950, a Judgment was entered of record in this office in the above-entitled case.

C. W. CALBREATH,
Clerk, U. S. District Court.

San Francisco, California, September 11, 1950.

In the United States District Court for the Northern District of California, Southern Division
No. 28851-R

FENWAL, INCORPORATED, a Corporation,
Plaintiff,

vs.

W. RAY MONTGOMERY, FREDERICK H.
MONTGOMERY and MONTGOMERY
BROTHERS, a Partnership,
Defendants.

NOTICE OF APPEAL

Notice is Hereby Given that Fenwal, Incorporated, a corporation, plaintiff above named, hereby

appeals to the United States Court of Appeals for the Ninth Circuit from the portions of the final judgment entered in this action on the 11th day of September, 1950, adjudging that the plaintiff have and recover from defendants the sum of \$10,110.20 with interest thereon at the rate of six per cent per annum from February 23, 1949, to the date of said judgment, with costs to neither party.

Dated: October 10, 1950.

/s/ MORRIS M. DOYLE,

/s/ JOSEPH W. GROSSMAN,

McCUTCHEN, THOMAS,

MATTHEW, GRIFFITHS, &
GREENE,

Attorneys for Plaintiff.

[Endorsed]: Filed October 11, 1950.

In the Southern Division of the United States
District Court for the Northern District of
California

No. 28851-R

FENWAL, INCORPORATED, a Corporation,
Plaintiff,

vs.

W. RAY MONTGOMERY, FREDERICK MONT-
GOMERY and MONTGOMERY BROTH-
ERS, a Partnership,

Defendants.

W. R. MONTGOMERY and FREDERICK
H. MONTGOMERY and MONTGOMERY
BROTHERS, Doing Business Under the Firm
Name and Style of MONTGOMERY BROTH-
ERS,

Cross-Complainants,

vs.

FENWAL, INCORPORATED,

Cross-Defendant.

Before: Hon. Claude McColloch,
Judge.

REPORTER'S TRANSCRIPT

July 11, 12 and 13, 1950

Appearances:

For the Plaintiff and Cross-Defendant:

MESSRS. McCUTCHEN, THOMAS,
MATTHEW, GRIFFITHS &
GREENE, by
MORRIS M. DOYLE, ESQ., and
FELIX F. STUMPF, ESQ.

For the Defendants and Cross-Complainants:

CHARLES A. CHRISTIN, ESQ.

* * *

JOHN M. STORKERSON

a witness called on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the
Court, please?

A. John M. Storkerson.

Direct Examination

By Mr. Doyle:

Q. Where do you reside?

A. I reside in Ashland, Massachusetts.

Q. What is your occupation?

A. My occupation is that of general manager
of Fenwal Incorporated. [19*]

Q. What is Fenwal Incorporated?

A. Fenwal Incorporated is a corporation doing
business in Ashland, Massachusetts, its field being

* Page numbering appearing at top of page of original Reporter's
Transcript of Record.

(Testimony of John M. Storkerson.)

the manufacture and sale of a thermostatic type of temperature control devices and of various other types of controls and equipment.

Q. How long have you been engaged in this occupation?

A. I have been there since February of 1945.

Q. In the capacity of general manager during all of the time?

A. In the capacity of general manager during four years of that period, and vice-president and general manager during this last year.

Q. You are now vice-president and general manager?

A. Yes.

Q. Are you familiar with the contract entered into between Fenwal and Montgomery Brothers?

A. Yes.

Q. Dated May 26, 1944?

A. Yes, sir.

Q. I show you, Mr. Storkerson, an original agreement dated May 26, 1944, between Fenwal Incorporated and Montgomery Brothers and ask you whether or not that is the agreement to which you have just referred?

A. It is.

Q. I direct your attention to the fact that attached to the [20] agreement is a letter dated May 1, 1944, addressed to Mr. Fred Montgomery, Montgomery Brothers, and signed Fenwal Incorporated, W. J. Turenne, and ask you if that has been treated by the parties as a part of the contract?

Mr. Christin: May I see that again? I didn't have that on my copy.

Mr. Doyle: It is a letter set up in your answer.

(Testimony of John M. Storkerson.)

Mr. Christin: The one set up in my answer, attached to it?

Mr. Doyle: Yes; I thought you had seen it.

Mr. Christin: I haven't seen this letter. We have them separated. Here they are together.

Q. (By Mr. Doyle): I don't think you answered the question, Mr. Storkerson.

The Witness: I didn't see that attachment?

Mr. Doyle: Would you read the question, please?

A. Yes, we did.

Mr. Doyle: Plaintiff offers this as its Exhibit 1.

The Court: It may be admitted.

The Court: Plaintiff's Exhibit 1 in evidence.

(Contract and letter referred to were marked plaintiff's Exhibit No. 1 in evidence.)

PLAINTIFF'S EXHIBIT No. 1

[Plaintiff's Exhibit No. 1 is identical to Exhibit A attached to Answer and Cross-Complaint. See page 5 of this printed record.]

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Was there an amendment to that contract under date of November 11, 1946, if you know?

A. There was an amendment made; I am not positive as to the [21] exact date. I believe that is it.

(Testimony of John M. Storkerson.)

Q. I show you an original agreement consisting of one page, dated October 11, 1946, signed Fenwal Incorporated by J. M. Storkerson and Montgomery Brothers by F. H. Montgomery, and ask you if you identify that agreement as the one to which you have referred in your testimony?

A. That is.

Q. Is that your signature?

A. It is my signature.

Mr. Doyle: I offer this as plaintiff's Exhibit 2.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 2 in evidence.

(Contract dated October 11, 1946, marked Plaintiff's Exhibit No. 2 in evidence.)

PLAINTIFF'S EXHIBIT No. 2

[Plaintiff's Exhibit No. 2 is identical to Exhibit B attached to Answer and Cross-Complaint. See page 9 of this printed record.]

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Are you familiar with the course of business under the contract of May 26, 1944, and the amendment of October 11, 1946?

A. I am.

Q. Will you describe that course of business?

A. The course of business was that Montgomery Brothers were to solicit various potential customers

(Testimony of John M. Storkerson.)

throughout the territory assigned to them in order to obtain orders for us.

As their work, the sales work, progressed to the point where an order was secured, it was made out in the name of Montgomery Brothers, and they in turn would place a regular [22] Montgomery Brothers purchase order on our company.

That order would be sent to us at Ashland, and would be entered in our incoming register and sent through departments for a series of processes.

The first would be the editing of the order as to correctness of price, technical details, all of the terms and other features in that order, to make sure that it would be satisfactory to us. It also was sent down through the accounting department for a like approval from the standpoint of prices and any other information that pertained to the financial angles of the particular order.

It would then be—if it was approved by them—the people in the sales department who edited the order and the accounting department—it would be authorized for our people to issue to Montgomery Brothers an acceptance copy of the purchase order, which in most cases did not indicate delivery, other than to say that we would advise the condition of—or we would advise when we would ship the order at a later date, the reason for that being we couldn't always tell at the time the orders came in just how it would fit, into our production schedule.

We would then issue another order on our own shop, which is a copy of the same acceptance, di-

(Testimony of John M. Storkerson.)

rected to the Montgomery Brothers, which usually would go on down to our production planning department, and there the people would check the particular [23] item, all of the materials, components, everything it would take to manufacture; they would check into the production loading on all of our equipment and determine when we could reasonably expect to make delivery. And when that date or schedule was determined, we would send a second acceptance to Montgomery Brothers, which was a complete duplicate of the first one, with the exception that it supplied the delivery information. That order then being on our shop, the production planning department would control the bringing together of the materials, machines and man-power to produce it in accordance with schedule, and it would eventually be placed in our shipping department ready for shipment to Montgomery Brothers.

At that point, very often in this particular business the equipment or material would have to be held for inspection by Army or Navy personnel, because a great deal of it was contract business involving contracts under Army and Navy jurisdiction.

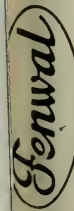
The Court: Are you talking about their business or your business, generally?

A. Their business. We had other equipment contracts from other firms.

Q. During the period of your business with them—which began what year?

FENWAL INCORPORATED

Ashland, Massachusetts, U. S. A.



REG. U. S. PAT. OFF.

OUR ORDER
NUMBER

DATE ENTERED

APPROX.
SHIP. DATE

SHIP VIA

CUSTOMER'S
ORDER NO.

SHIP TO -

SOLD TO -

EXPORT LIC.
IMPORT LIC.

METHOD OF PAYMENT
SALESMAN

TERMS: 1/3% 10 - NET 30 - F. O. B. ASHLAND. INTEREST CHARGED AFTER 30 DAYS

INVOICE NUMBER
INVOICE DATE
PACKING SLIP NUMBER
DATE SHIPPED
HOW SHIPPED
NET WT.
GROSS WT.
BOX DIM.

QUANTITY ORDERED	CATALOG NUMBER	SPECIFICATIONS	UNIT PRICE	BALANCE AFTER THIS SHIPMENT	QUANTITY SHIPPED	EXTENSION
---------------------	-------------------	----------------	------------	--------------------------------	---------------------	-----------

ACKNOWLEDGMENT
ONLY
INVOICE WILL FOLLOW SHIPMENT

1
2
3
4
5
6
7

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 3—(Continued)

[Acceptance of Order—Reverse.]

Terms and Guarantees Applying to all Sales
Unless Otherwise Agreed

Terms:

To customers with credit approved by our Treasurer's Office, our terms are $\frac{1}{2}$ per cent discount for cash within 10 days of date of invoice, 30 days net, interest after 30 days. Specifications, prices and discounts quoted are subject to change without notice. Prices are F.O.B Ashland, Mass. All orders are accepted subject to delays occasioned by strikes, accidents, or causes beyond our control.

Claims:

Claims for shortages or errors must be made within five (5) days after receipt of shipment and should be accompanied by our packing slip or photostatic copy of same.

Returns:

No goods are to be returned without our authorization.

Deliveries:

Delivery dates are estimates only.

Cancellation of Orders:

Orders accepted by us may be cancelled only with our consent and subject to such cancellation charge as may be determined by us.

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 3—(Continued)

Deferred Orders:

Customer's changes in delivery schedule on orders which are in process are subject to revision in price or a charge for the work already in process.

Guarantees:

Item 1. Standard Products Guarantee

It is our ambition to have every article bearing the "Fenwal" trade-mark give complete satisfaction. We maintain high standards for our workmanship and materials and for the inspection of our products, but it is not humanly possible to have every piece perfect. Therefore, if we find that any Fenwal product sold under this guarantee shows a defect in material or workmanship within one year after it leaves our factory, Fenwal Incorporated will gladly repair it or replace it without expense to the customer, except for transportation charges. We cannot be responsible for repairs made by others, for apparatus, equipment or parts made by others or for consequential damages.

This guarantee does not apply to damage to our products resulting from corrosion, electrolysis or other injurious operating conditions. No one is authorized to assume for us any liability except as above set forth. Requests that we repair or replace products must be made within

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 3—(Continued)

10 days after discovery of a defect in material or workmanship.

Item 2. Appliance Thermoswitch Guarantee

This guarantee is the same as Standard Products Guarantee except that it extends only 90 days after shipment.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): I direct your attention, Mr. Storkerson, that near the top of the form there appears the typing, "terms $\frac{1}{2}\%$ 10—net, 30, f.o.b. Ashland—interest charged after 30 days" and ask you whether that $\frac{1}{2}\%$ 10 indicated a change from an earlier form in the course of your business under this contract? A. It did.

Q. When was that change made?

A. I don't remember exactly; it must have been—I don't remember, other than it might have been perhaps a year preceding the close of business with Montgomery Brothers; about the first of 1948. I would have to look at the records to determine.

Q. Around the first of 1948 then—

A. Yes.

Q. —a year before the contract was terminated, what had been the stipulated discount rate prior to that time for ten day payment?

A. One per cent.

Q. Do you recall the occasion upon which the

(Testimony of John M. Storkerson.)

contract with Montgomery Brothers was cancelled?

A. I do.

Mr. Doyle: And do you have the original letter of December 29, 1948, from Fenwal to Montgomery Brothers, Mr. Christin? [27]

(Mr. Christin handed a document to Mr. Doyle.)

Q. (By Mr. Doyle): I show you a letter dated December 29, 1948, on the letterhead of Fenwal Incorporated and signed C. M. Walter, president, and ask you if that is the letter of termination?

A. It is.

Mr. Doyle: I offer this document as plaintiff's Exhibit 4.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 4 in evidence.

(The letter dated December 29, 1948, Fenwal to Montgomery, was marked plaintiff's Exhibit 4 in evidence.)

PLAINTIFF'S EXHIBIT No. 4

Air Mail

Registered—Return Receipt Requested

December 29, 1948

Montgomery Brothers

1122 Howard Street

San Francisco, California

Gentlemen:

This will notify you that we elect to terminate

(Testimony of John M. Storkerson.)

our agreement with you dated May 26, 1944, as amended by our agreement dated October 11, 1946, this termination to be effective sixty (60) days after the receipt by you of this letter.

We believe that it will be possible for you and us to work out the details of the handling of orders which we have received from you either by correspondence or telephone but we shall be glad to confer with you about this if you feel that it is desirable that we do so.

Very truly yours,

FENWAL INCORPORATED,

/s/ CARL W. WALTER,

President.

CWW:MM

Received December 31, 1948.

[Endorsed]: Filed July 11, 1950.

Mr. Doyle: Who is the C. M. Walter who signed that letter?

A. That is Dr. C. M. Walter, who is president of our corporation.

Q. Was then? A. Was then, correct.

Q. And is now? A. And is now.

Q. Was there a reply to that letter of December 29, 1948, do you recall? A. There was.

The Court: I believe it is customary at this time of the morning to take a brief recess. [28]

(Recess.)

(Testimony of John M. Storkerson.)

Q. (By Mr. Doyle): I show you a two-page letter on the letterhead of Montgomery Brothers dated January 7, 1949, and ask you if that was received at the office of Fenwal in Massachusetts?

A. Yes, it was.

Q. Directing your attention to the handwritten entry on the upper right hand corner "Received January 14, 1949, 10 a.m., J.M.S." do you know who put that there? A. I did.

Q. Is that in your hand?

A. It is in my hand.

Q. Are those your initials?

A. Yes, they are.

Mr. Doyle: I offer this document as plaintiff's Exhibit 5.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 5 in evidence.

(Letter dated January 7, 1949, Montgomery to Fenwal, marked plaintiff's Exhibit 5 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 5

[Letterhead]

Montgomery Brothers
1122 Howard Street
San Francisco 3, U. S. A.

January 7, 1949

Registered Mail
Return Receipt Requested
Fenwal Incorporated
Ashland, Massachusetts

Attn.: Dr. Carl Walter, President

Dear Carl:

Answering your letter of December 29, 1948.

First, its contents was quite a surprise to us, especially in view of the fact that since we have been your exclusive Western representatives we have increased the sale of your equipment every year over the preceding year, from a few thousand dollars the first year, to many hundreds of thousands of dollars in 1948.

Secondly, we have expended large sums of money and unlimited man hours by our sales and engineering staff in developing applications and securing orders for your equipment. Further, it was through our joint efforts that we were able to develop satisfactory thermostwitches for the aircraft industry, which has resulted in large volume sales.

Third, you are acting within the terms of our Sales Agreement in terminating same as you have elected to do. However, we will expect you to ac-

(Testimony of John M. Storkerson.)

cept all orders that we place with you until the date of termination of the before-mentioned Sales Agreement regardless of the release schedules and the date of actual shipments as called for in our purchase orders.

Further, on all our orders now at the factory and all orders placed prior to the termination date, we expect shipments to be made and go forward in accordance with shipping instructions.

In closing, we find nothing in our records to indicate that during the years we have been associated together any unpleasant situations or misunderstandings have marred our friendly relations and we will welcome the opportunity of discussing any matters with Mr. Storkerson as undoubtedly he is planning a trip to the Pacific Coast.

Yours very truly,

MONTGOMERY BROTHERS,

/s/ W. RAY MONTGOMERY.

WRM:da

Received January 14, 1949.

[Endorsed]: Filed July 11, 1950.

Mr. Christin: Exclusive of that part which is in the witness' handwriting.

Mr. Doyle: The witness has identified it as having been put on the document by him upon receipt of it. I see no purpose in its exclusion. [29]

(Testimony of John M. Storkerson.)

Mr. Christin: I don't think we are bound by that. It wouldn't be material.

Mr. Doyle: Stipulated that you are not bound by it.

Q. Did Fenwal reply to that communication from Montgomery Brothers? A. We did.

Mr. Christin: Do you intend to read these letters that have come in? You just put them in evidence.

Mr. Doyle: Perhaps some of them. Just at present I will admit them only.

I ask you if you have an original telegram dated January 12, 1949, addressed to Montgomery Brothers and signed Fenwal Incorporated, J. M. Storkerson?

Mr. Christin: Yes (handing document to Mr. Doyle).

Q. (By Mr. Doyle): I show you a telegram dated January 12, 1949, signed Fenwal Inc., J. M. Storkerson, and ask you if that is a communication of that date from you to Montgomery Brothers?

A. It is.

Mr. Doyle: I offer this as plaintiff's Exhibit 6.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 6 in evidence.

(Telegram, dated January 12, 1949, Fenwal to Montgomery, was marked plaintiff's Exhibit 6 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 6

[Western Union Telegram]

949 Jan 12 AM 9 10

SFABO 43 PD-WUX Ashland Mass 12 1150A
Montgomery Bros, Attn F H Montgomery
1122 Howard St.

Would Like to Have Discussion With You in San
Francisco January 24th If This Is Agreeable.

FENWAL INC

J M STORKERSON

Received January 12, 1949.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Did you receive a reply?

A. I did. [30]

Q. I show you a telegram dated January 12 addressed to J. M. Storkerson, Fenwal Incorporated, signed Montgomery Brothers, and ask you if that was the reply? A. It is.

Mr. Doyle: I offer the document as plaintiff's Exhibit 7.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit No. 7.

(Telegram, dated January 12, 1949, Fenwal to Montgomery, was marked plaintiff's Exhibit No. 7 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 7

[Western Union Telegram]

WU3 PD-MK San Francisco Calif Jan 12 414P

J M Storkersen

Fenwal Inc

Retel Will Be Glad to See You January 24 in
San Francisco Regards

MONTGOMERY BROS

F H MONTGOMERY

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Did Fenwal make any other reply to the Montgomery Brothers letter of January 7, 1949? A. Yes.

Mr. Doyle: Do you have the original of a letter dated January 20, 1949, addressed to Montgomery Brothers and signed by Fenwal?

(Mr. Christin handed a document to Mr. Doyle.)

Q. (By Mr. Doyle): I show you a letter on the letterhead of Fenwal Incorporated dated January 20, 1949, consisting of two pages, signed Fenwal Incorporated, Carl W. Walter, addressed to Montgomery Brothers at San Francisco, and ask you if you recognize that letter as having been sent on or about its date? A. I do.

Mr. Doyle: I offer the document as plaintiff's Exhibit 8.

(Testimony of John M. Storkerson.)

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 8 in [31] evidence.

(The letter dated January 20, 1949, Fenwal to Montgomery, was marked plaintiff's Exhibit 8 in evidence.)

PLAINTIFF'S EXHIBIT No. 8

January 20, 1949

Montgomery Brothers
1122 Howard Street
San Francisco 3, California

Attention: Mr. W. Ray Montgomery

Dear Ray:

This answers your letter of January 17, 1949.

We see no reason why you should be surprised by our action, as we have repeatedly brought to your attention the fact that we have not been satisfied with your representation of us in the territory covered by our agreement. Our requests and suggestions for improvements have been almost entirely disregarded by you, and we have been reluctantly forced to the conclusion that the termination of our relationship is essential.

The assistance you have rendered in connection with the aircraft business is appreciated. However, you understand that the development of satisfactory Thermoswitches for that industry has been a nation-wide Fenwal effort. You are only one of a number of representatives who have been actively

(Testimony of John M. Storkerson.)

engaged in securing information as the basis of our engineering design and development work.

Fenwal has devised new manufacturing methods and techniques in order to provide satisfactory Thermoswitches for aircraft. Obviously, the principal effort has been that of our factory organization, engineers, and technical personnel.

We note that you expect us to accept all orders that you place with us until the date of termination of the agreement, regardless of the release schedules and dates of shipments, and that you expect shipments to be made on all orders now at the factory and those placed prior to the termination date. That expectation on your part seems to us unfair to Fenwal and not in accordance with our contract with you. We expect to fill orders which have been accepted by us or may later be accepted by us, provided you carry out your part of the contract. It seems likely that the filling of those orders will involve an adjustment of the discount or commission allowed to you, but we shall not try to discuss details in this letter.

It is our desire that the termination of our contract should be carried out as smoothly and as pleasantly as is possible for all concerned. We cannot be required to accept orders given to us by you or by anyone else. In view of your failure to give us the type of representation which we have had a right to expect under the terms of our agreement with you, we are surprised that you should suggest that you think we should fill orders in the manner outlined in your letter.

(Testimony of John M. Storkerson.)

Our Mr. Storkerson will talk with you in San Francisco in the near future, and it is our hope that you and he will be able to work out a mutually satisfactory plan for handling the problems which are involved in the termination of our business relationship.

We regret from the personal point of view that the business situation requires us to make other arrangements for the handling of our sales in your former territory.

Very truly yours,

FENWAL INCORPORATED,

/s/ CARL W. WALTER,

By C. W. WALTER,
President.

CW:MM

Received January 24, 1949.

[Endorsed]: Filed July 11, 1950.

Mr. Doyle: I direct the attention of the witness to the fact that the opening sentence of this letter is, "This answers your letter of January 17, 1949." I understand, Mr. Christin, it may be stipulated that that was an erroneous reference and that the reference is necessarily to the letter of January 7, 1949, not January 17, 1949.

Mr. Christin: So stipulated.

Q. (By Mr. Doyle): That is your understanding of the intention? A. Yes, sir.

(Testimony of John M. Storkerson.)

Q. Was the letter of January 20th to which you have just referred sent in the usual course of the mail? A. No.

Q. How was it transmitted to Montgomery Brothers, if you know?

A. I delivered it personally to Montgomery Brothers.

Q. In San Francisco?

A. In San Francisco.

Q. What were the circumstances under which the letter was delivered?

A. Well, we had made arrangements for a meeting here on the exchange of telegrams, and I had come here for the purpose of trying to work out an arrangement with Montgomery Brothers for orderly termination of their business with us, they [32] having taken the position that they were entitled to all profit on all orders given regardless of schedules or other conditions, and it was my understanding——

Mr. Christin: I think, your Honor, these are conclusions. We do not object to the conversations from which he draws the conclusion, but not the conclusions.

The Court: He can testify subject to the objection. Go on and tell your story. I like to hear the story the way people want to tell it.

The Witness: When I arrived in San Francisco I told Montgomery Brothers that it was the position of our Mr. Turenne, who was in charge of the company as general manager at the time their negotiations were developed originally——

(Testimony of John M. Storkerson.)

Mr. Christin: Just a moment. You say when you arrived in San Francisco. When was that?

Mr. Doyle: Will you please identify the time, place and persons present in this conversation?

A. Yes; I arrived at their office—if I may make reference to a date in here, I arrived at their office on the morning of Monday, the 24th, and it was their office here in San Francisco.

The Court: What year?

A. 1949. I arrived here at their office on that morning, and met first Mr. Fred Montgomery.

Q. (By Mr. Doyle): Did you deliver the letter of the 20th, first of all? [33]

A. I delivered it as soon as Mr. Fred Montgomery and Mr. Ray Montgomery were together with me in the office.

Q. Anyone else present?

A. No, not that I remember.

Q. State the conversation as best you recall it?

A. They first asked me what the termination was all about, and I gave them Dr. Walter's letter. They both read it and asked me a great number of questions pertaining to the termination. They took the position that—essentially they took the position that they were entitled to all of the profits on all of their orders placed with us up to the end of the termination date. I told them that Mr. Turenne of our company had the understanding that that 60-day termination was to be effective literally, and that after that date it was our position basically that they were not entitled to—

(Testimony of John M. Storkerson.)

Mr. Christin: A little bit louder, please; I can't hear you.

The Witness: I beg your pardon?

Mr. Christin: A little bit louder. I can't hear you.

A. Surely. I told them that it was, therefore, our position that they were not entitled to profits after the 60-day period. I told them that I hadn't come there to argue the past or the termination; I had come there to try to work out an orderly arrangement, and in doing so I immediately set forth a number of points on which we would be immediately willing to proceed [34] with the termination. Those were, as I recall them, first we would give them full profit on all orders which we had accepted, and, secondly, that we would give them full profit on all orders shipped by us during their first two months or during the 60-day termination period if they were shipped, whether or not we had accepted them. I said that on all orders which we hadn't accepted that were to be shipped or where shipments were to be made against them after the end of the termination period, that I felt an adjustment should be made in the profits to be allowed Montgomery Brothers. And I believe I made some suggestions on it.

Q. Did you state any reason why you thought an adjustment should be made?

A. Well, yes, I did.

Q. What did you state?

A. Well, in the first place I felt that that was

(Testimony of John M. Storkerson.)

a very fair offer to Montgomery Brothers, which went away beyond our——

Mr. Christin: If your Honor please, I think that these are legal conclusions,—“I thought it was a fair offer.”

Mr. Doyle: They may go out.

Q. State the reasons that you gave for your proposal, please, Mr. Stockerson?

A. The reasons I gave for the proposal were to give them a fair and equitable settlement arrangement to the best of our ability. And, further, we discussed, I am sure, and as I [35] remember it, the fact that there would be a problem involved in this termination and that I felt that the orders—continuing orders after the termination date would have to be assigned to our company, because I couldn't possibly conceive of how they could continue to make shipments of those orders and give the service that was necessary to be given to handle the problems of possible rejection—rejected material, changes in requirements, changes in technical specifications, and all of the various things that are a continuing part of dealing with the aircraft companies on this type of business. They would be no longer our representative after that date. Therefore, we should properly take care of that responsibility ourselves, as it would be perfectly foolish to have, on one individual order or on two individual orders, to have an aircraft company be forced to deal with two companies on the details of that order.

(Testimony of John M. Storkerson.)

Q. Proceed with your summary of the discussion, please.

A. They asked me what our plans were. I told them, one, that we intended to open our own office in Los Angeles. I told them further that we—upon being asked what we were going to do with the territory north of the normal Los Angeles territory, I told them I didn't know; that we hadn't yet made plans for it.

I was asked whether we had in mind to consider them to continue in that area. I told them in essence that we had no [36] plans for it; that I would be perfectly willing to consider it; but I was there for the purpose of handling the termination.

I don't remember just how the discussion went after that, except that it developed this fact: That we were—well, let me put it this way: As I recall, we carried the conversation along that line, and I was very explicit, not only once but a number of times, and I absolutely would not discuss the matter of extending or negotiating a new contract and tie that in any way to the termination. I wanted to get the termination settled first on an orderly basis, and I told them that I would discuss with my company the possibility of negotiating a future contract with them for the Northern Territory.

Q. You mean you separated the question of their profit from orders for later delivery on the question of their continued representation under a new contract?

A. I did.

Q. In the Northern Territory?

(Testimony of John M. Storkerson.)

A. I did. And at that time, to the best of my recollection, it was not questioned.

Mr. Christin: What is that?

(The Reporter read the answer.)

The Witness: Now about that stage—of course this conversation goes over a two-day period. [37]

Q. (By Mr. Doyle): In San Francisco?

A. In San Francisco.

Q. With both Fred and Ray Montgomery present throughout?

A. With both of them present practically all of the time. There were occasions when I would talk to one or the other while one of them was out on his individual business in the office, so I am not sure that they were both present at all times.

At the end of the first day, if my memory is correct, I told them that I would discuss with my company the potentialities—well, I don't remember exactly how this happened, but I do remember very definitely that it came to a point where I was excused from their office because they wished to talk together, and they very kindly delegated a Mr. Conant to take me out driving around the city for a few hours while they discussed the matter.

Upon my return—I remember again returning to the office of Montgomery Brothers, and, as I recall, it was Mr. Fred Montgomery, sat behind his desk with a series of items on which he, in effect, asked me, "What do you think of this as as basis for our agreement on the termination?"

Those items, as I recall, were taken by him with

(Testimony of John M. Storkerson.)

reference to a piece of paper while he talked to me. At the conclusion of that and the discussion of that, I said I was perfectly willing to recommend such a settlement to my company [38] and agreed to get in touch with the people at Ashland.

I furthermore said that I would consider—that is the maximum commitment given at that time—the potentialities of negotiating with them a future contract for the Northern Territory. That led up to the question of what we were going to do on the basis of our probable acceptance of the termination terms, and I suggested to Mr. Ray Montgomery that the best way to handle it I thought would be for he and I together to visit the various aircraft companies who were the principal accounts, particularly in the Los Angeles territory, and announce to them a cessation, the effort being that while we knew that eventually and as soon as possible that—and we discussed this—that assignments would have to be made in that area for that to be handled properly, we did not wish to involve customers who really had nothing to do with the business between Fenwal and Montgomery Brothers. So it was agreed that we would proceed on that basis.

Q. Go ahead. What happened next?

A. I went back to the hotel.

Q. You don't need to give the details of it, just an outline.

A. I called our plant and secured their agreement in principle on the various points which I

(Testimony of John M. Storkerson.)

had, as I recall, taken down as I discussed them with Mr. Montgomery on the preliminary settlement. And I made arrangements to go down the following day to Los Angeles, where I met Mr. Montgomery.

Q. Which Mr. Montgomery? [39]

A. Mr. Ray Montgomery on the Thursday of that week, which was the 27th, I believe.

Q. What are you referring to there?

A. I am referring to merely a little sketch or calendar, which gives the calendar date.

Q. Your itinerary of that trip?

A. It is briefer than that; it is just a note to show dates.

Q. Very well.

Mr. Christin: Nothing there is a memorandum of a conversation, is there, counsel?

Mr. Doyle: Not so far as I know. You can look at it.

Mr. Christin: If it is dates I don't care; it is all right.

The Witness: So that that would be on the 27th—morning of the 27th—I met Mr. Ray Montgomery for the purpose of straightening out affairs with various aircraft companies in Los Angeles. We went to his office in Los Angeles while we had considerable discussion as to what the plan——

Mr. Christin: May we have the foundation, please? Who was present?

A. Mr. Ray Montgomery was present; Mr. Hawkins was present.

(Testimony of John M. Storkerson.)

Mr. Doyle: Who is Mr. Hawkins?

A. An employee of Montgomery Brothers.

Q. Who else?

A. A Mr. Tompkins. No; wait a minute; it was some of the [40] office personnel of Montgomery Brothers Company; I can't remember exactly who they were, that were in and out of the office from time to time.

Q. Very well.

A. During that morning we worked out the plan as to where we would go, which companies we would go and see, which ones we would go to first, and we proceeded. At the same time there was a running discussion with regard to potential future relations. Having in the interim talked to my company, I told them—Mr. Ray Montgomery—that the termination being agreeable to us, that I would proceed with the negotiations for a contract but, again, I kept them distinct and separate. I merely reported to him that we were interested in the proposal.

So we proceeded to the various aircraft companies throughout the area. They being the accounts of Mr. Ray Montgomery, I felt it was his greater responsibility to open the discussions with them, which he did, and to each one we told them in essence that——

Mr. Christin: If your Honor please, I think the conversation should be given. This is rather important—"in essence."

Mr. Doyle: You can bring it out on cross-ex-

(Testimony of John M. Storkerson.)

amination, Mr. Christin. All I want is a summary of the discussion.

Mr. Christin: As I understand the rules of evidence, they can state what was said there, but cannot draw conclusions as to what is usual and things of that kind. I think we [41] are entitled to that on direct.

The Court: Overruled.

Q. (By Mr. Doyle): State what was done, Mr. Storkerson, if you will.

A. Well, Mr. Ray Montgomery would usually do the principal talking; I can't tell you exactly what his words were, but I know that he said to the individual companies that they were going to cease representing Fenwal in the area on March 1st and that Fenwal would be operating directly with the aircraft companies; that we would get in touch with them at a later date. He thanked them for the business they had given them. He told them that he hoped to be able to continue on in the northern territory representing our company. He told them that we were in agreement; that this termination should take place—I mean this transfer, in Los Angeles; that, therefore, we went to all of the aircraft companies, which took a period of several days, which, as I have it here, would be the 27th, 28th, and possibly on the 29th. I think it was principally the 27th and 28th.

Then on Sunday, which was the 31st of January, then I was asked to meet Mr. Ray Montgomery at his hotel, to meet him on Sunday morning at the

(Testimony of John M. Storkerson.)

hotel in Los Angeles for a conference, which I did.

We had breakfast together, went up to his room and talked. At that time Mr. Montgomery proceeded to—— [42]

Mr. Christin: May I have the foundation of who was present?

A. Myself, Mr. Ray Montgomery and Mr. Hawkins.

Q. (By Mr. Doyle): Anyone else?

A. No, not that I remember.

Q. Go ahead.

A. During that conversation Mr. Ray Montgomery was asking me for a number of concessions to be made in addition to the agreement which I understood we had already reached. I had already——

Mr. Christin: I think that last part should go out, "which I thought we had already reached."

The Court: Motion denied.

The Witness: I recall among those concessions that I had already previously told him that we would, under no circumstances entertain the idea of renewing any contract with Montgomery Brothers which would be set up on the basis of the one we had just cancelled; if any new contract were to be considered it would have to be on the basis—the same basis as granted to all our other representatives located all throughout the country.

I also made a specific exception that I would not permit the Boeing Aircraft Company in Seattle to be handled; that was to be a definite exclusion;

(Testimony of John M. Storkerson.)

and I told him that the reason was that we wished to deal directly with Boeing.

The Court: Is this a patented article? [43]

A. Yes, sir, it is.

Q. Do you have competition?

A. Yes, we have competition. The competition isn't identical either in its concept or the method of approach. They try to meet the same problem from a different point of view.

Q. When was it patented?

A. It was patented—there were a lot of different patents. The original patent, I think goes——

Q. When did you people take hold of it?

A. When did we take over?

Q. Yes, your people.

A. One of our Company invented it.

Q. During the last war?

A. After that; it was—I can't tell exactly; it must have been in the late '20's.

The Court: You are speaking of the first war. Go ahead, Mr. Doyle.

Q. (By Mr. Doyle): Proceed, please, Mr. Storkerson.

A. At the same time I had said that we would expect him to use the same—exactly the same discount arrangement that we used with other representatives. Now those two points were among the points which were in contention at that Sunday morning meeting. And at that time I told Mr. Montgomery that I felt that he had changed his position; that he wasn't acting in accordance with

(Testimony of John M. Storkerson.)

the agreement reached in San Francisco, and [44] that I didn't intend to keep on providing additional concessions; that I was still standing on the agreement as we reached it in San Francisco. Then he made an effort to couple—he asked me—he told me that he would give us the termination agreement after he had seen the proposed contract for the north.

Q. What do you mean, give you the termination agreement? A. That he would——

Q. The agreement had been terminated, as I understood.

A. No; he would give his written confirmation of the San Francisco arrangements.

Q. You mean about commissions on orders, or profit on orders after the 60 days?

A. Yes.

Mr. Christin: I object to this leading at this particular time.

Mr. Doyle: It is stipulated it is a leading question. I was confused by his testimony.

Mr. Christin: I move that it go out.

The Witness: In any event, what we argued about was the fact that I still felt that they should sign a letter which was forthcoming from our company outlining the terms exactly as I had received them and discussed them in San Francisco and that should be acknowledged immediately and we would—entirely separate from that, I was prepared in good faith to go back [45] and start work on the

(Testimony of John M. Storkerson.)

issuance of or the negotiation of a new contract with them.

Then I was asked how soon I could get the papers out, and I said that a letter would be forthcoming from our company with regard to the San Francisco agreement immediately; that the new contract that he was so concerned about, that I would immediately upon my return home set to work on it, and suggested to him that I would get in touch with him regarding that negotiation not later than approximately 10 days.

The Court: If you cut Boeing out of it what would be included in the new contract outside of Southern California?

A. If you cut Boeing out of the area north of the Los Angeles territory, it would leave their industrial accounts in this whole area.

The Court: That is the important part of it; it would leave no aircraft business?

A. It would leave no aircraft business; that's right.

The Court: There are different types of business?

A. They are different types of business.

Q. (By Mr. Doyle): Go ahead, Mr. Storkerson.

A. So I—that finished the negotiation with Mr. Ray Montgomery on the Sunday and I returned home——

Q. Was there any other discussion—pardon?

A. And I returned home very shortly thereafter.

(Testimony of John M. Storkerson.)

Q. When you returned to Boston or to Ashland, did you send [46] forward to Montgomery Brothers your version of the arrangement reached at San Francisco?

A. It had gone forward before I actually arrived home, because I had transmitted it completely by telephone to Dr. Walter.

Q. And had he sent a letter to Montgomery Brothers embodying your telephone conversation with him? A. He had.

Mr. Doyle: Do you have the letter of February 4, 1949, please?

Mr. Christin: I don't seem to have the original here.

Mr. Doyle: May I use a copy?

Mr. Christin: I have one here you can use.

Q. (By Mr. Doyle): I have received from defendants' counsel and show you what purports to be a copy of a two-page letter dated February 4, 1949, addressed to Messrs. Fred and Ray Montgomery, Montgomery Brothers, San Francisco, and concluding Fenwal, Incorporated, by Carl W. Walter, President. Subject to check as to the comparison of this copy with our record of the original, is that the letter to which you refer?

A. That is right.

Mr. Doyle: I offer this copy as Plaintiff's Exhibit 9, with the stipulation if you please, Mr. Christin, that it may be compared with our copy of the original.

Mr. Christin: Oh, yes, certainly.

(Testimony of John M. Storkerson.)

Mr. Doyle: And any discrepancies corrected accordingly. [47]

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 9 in evidence.

(Copy of letter dated February 4, 1949, Fenwal to Montgomery, marked Plaintiff's Exhibit No. 9 in evidence.)

PLAINTIFF'S EXHIBIT No. 9

February 4, 1949

Special Delivery—Air Mail

Messrs. Fred & Ray Montgomery

Montgomery Brothers

1122 Howard Street

San Francisco 3, California

Dear Fred & Ray:

In confirmation of the negotiation between your company, and our Mr. J. M. Storkerson, relative to the termination of our sales agreement, the termination being effective March 1, 1949; we wish to outline for your confirmation the following points of agreement which establish the basis for handling the mechanics of cancellation.

- 1.0 All orders for Fenwal products, from the territory of Montgomery Brothers, which are dated prior to January 3, 1949, and regardless of the shipping schedule on the order, are to be handled by both Fenwal, Incorporated, and

(Testimony of John M. Storkerson.)

Montgomery Brothers, under the discount terms of the cancelled sales agreement.

2.0 All orders for Fenwal products, from the territory of Montgomery Brothers, which are dated later than January 2, 1949, but before March 1, 1949, shall be handled in the following manner:

2.1 All shipments made before March 1, 1949, shall be handled as outlined in 1.0, above.

2.2 All shipments made March 1, 1949, and after, shall be handled as follows:

2.2.1 Montgomery Brothers shall request permission of the customer to assign the orders to Fenwal and, if permission is given, shall assign such order to Fenwal at once.

2.2.2 Fenwal shall bill all assigned orders and pay Montgomery Brothers as commission, an amount equal to 50% of the amount they would have earned had the orders not been so assigned and had the territory contract not been cancelled.

2.2.3 In order to eliminate delays, prior to order assignment, Fenwal shall ship against Montgomery Brothers' orders at a price which will provide Montgomery Brothers with the same earning as in 2.2.2, above.

(Testimony of John M. Storkerson.)

3.0 The total amount of business under 2.0 shall not exceed \$80,000.00.

4.0 It is understood that orders under this agreement represent the requirements for certain contract production applications. We realize that there may be changes in the types of Thermoswitches, or modifications in application, which will require changes in customer's requirements and contracts. All such changes, wherever possible, shall be requested as changes in the customer's original contract. In any event, even if a new order is required, Montgomery Brothers shall receive as discount, or commission, the same percentage on units shipped that they would have received on the original order, up to the number of units on the original order.

5.0 If this letter is acceptable to you, please sign the enclosed copy and return it to us.

Very truly yours,

FENWAL INCORPORATED.

By CARL W. WALTER,
President.

MM

Encl.

(Testimony of John M. Storkerson.)

San Francisco, California

February . . , 1949

Fenwal Incorporated
Ashland, Massachusetts

Gentlemen:

The foregoing letter correctly states our agreement.

Very truly yours,

MONTGOMERY BROTHERS.

By

[Stamped]: Received February 7, 1949, Montgomery Bros.

[Endorsed]: Filed July 11, 1950.

Mr. Doyle: And with the understanding if counsel should discover the original letter in the course of the trial, it may be substituted.

Mr. Christin: I think I have it in another file, Mr. Doyle.

Mr. Doyle: You referred, Mr. Storkerson, to your statement to Mr. Ray Montgomery that you would send on proposed contracts for the northern territory after you returned to Massachusetts. Did you do so? A. I did.

Mr. Doyle: Do you have the letter of February 9, 1949, from Mr. Storkerson to Montgomery Brothers, with the attached contract?

(Testimony of John M. Storkerson.)

(Mr. Christin handed a document to Mr. Doyle.)

Q. (By Mr. Doyle): I hand you a letter on the letterhead of Fenwal, Incorporated, one page, dated February 9, 1949, addressed to Mr. Ray Montgomery, San Francisco, and signed "J. M. Storkerson, General Manager." Did you send that letter to Mr. Montgomery on or about its date?

A. I did.

Q. Did you enclose with the letter the three-page blank draft [48] of contract that I now exhibit to you?

A. I did. That appears to be the contract.

Mr. Doyle: I offer the two documents as a single exhibit, Plaintiff's Exhibit 10.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 10 in evidence.

(Letter dated February 9, 1949, Fenwal to Montgomery, and draft of contract, marked Plaintiff's Exhibit No. 10 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 10

Fenwal
Ashland, Massachusetts
Fenwal Incorporated

Air Mail—Registered—RRR

February 9, 1949

Mr. Ray Montgomery
Montgomery Brothers
1122 Howard Street
San Francisco 3, California

Dear Ray:

I am sending herewith two copies of the Fenwal Sales Agreement for your signature and return to us for our signature and completion of the contract—one copy of which will promptly be returned to you. This contract as I have told you is in the same form as that offered to other sales representatives with the exception of the several items you have discussed and which are modified in your favor in recognition of problems peculiar to the West Coast area.

I believe with this action and the letter you have already received from Dr. Walter that I have properly executed all the commitments which I have made to you during recent weeks. On receipt of this letter, we would appreciate your acknowledgment and acceptance by wire of Dr. Walter's letter of February 4, 1949, and confirmation by mail. You will observe that Dr. Walter's letter contains all

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 10—(Continued)

of the essential points you outlined to me in San Francisco as your basis for a fair termination of the old agreement.

You will agree with me that a prompt conclusion of these matters is in the interest of both of us and I ask that you advise us next week of the acceptance of the new arrangements.

Respectfully yours,

FENWAL INCORPORATED,

/s/ J. M. STORKERSON,

General Manager.

JMS:MM

Encls.

[Stamped]: Received Feb. 14, 1949, Montgomery Bros.

Agreement Dated February 14, 1949, at Ashland, Massachusetts, in the County of Middlesex and State of Massachusetts, between Fenwal Incorporated, a Massachusetts corporation, with its principal place of business and general office in Ashland, Massachusetts (hereinafter called the Manufacturer), and Montgomery Brothers, San Francisco, California (hereinafter called the Sales Representative).

Witnesseth:

Whereas, the Manufacturer produces and distributes Fenwal Thermoswitches and the Sales Rep-

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 10—(Continued)

representative desires an appointment as Sales Representative to solicit orders for the above-named Manufacturer.

Now, Therefore, for and in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

Art. 1. Exclusive franchise of territory is granted to the Sales Representative as follows:

The State of California lying north of the counties of San Luis Obispo, Kern, and San Bernardino, and the States of Washington, Oregon, Idaho, Western Montana, Nevada, Utah and the Territory of Alaska.

Art. 2. The Manufacturer grants the Sales Representative the right to solicit orders for the products listed in the Manufacturer's regular price list, and for other products made available by the Manufacturer for sale through the Sales Representative, subject to the rules of such solicitation in paragraphs six and seven.

Art. 3. The Sales Representative shall use its best efforts to solicit orders for the Manufacturer's products and agrees to pay its own traveling and other expenses and not to incur any expense in the name of the Manufacturer.

Art. 4. No order shall be accepted by the Sales Representative except upon the express condition that it is subject to acceptance by the Manufacturer at its head office in Ashland, Massachusetts. All

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 10—(Continued)

sales by the Sales Representative shall be at prices contained in the price list supplied by the Manufacturer. It is expressly understood that no device or arrangement shall be entered into by the Sales Representative with any customer which shall in any way result in sales below the scheduled prices as supplied by the Manufacturer from time to time.

Art. 5. All invoices for products sold by the Sales Representative shall be sent out by the Manufacturer to the customer.

Art. 6. Products shall be sold f.o.b. Ashland, Massachusetts. Commissions will be paid on the net f.o.b. prices of standard catalog products at Ashland, Massachusetts, in accordance with the varying schedule of discounts granted to individual customers as follows:

Customer's Discount	Sales Representative's Commission
10%	25 %
20%	22½ %
30%	20 %
35%	17½ %
40%	15 %
45%	12½ %
50%	10 %

Commissions to the Sales Representative will be credited by the Manufacturer to the Sales Representative's commission account immediately upon

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 10—(Continued)

shipment of the respective invoices on which commission is due, and on the 15th day of each calendar month the Manufacturer will pay the Sales Representative the amount of commissions due as of the last day of the preceding month. The decision of the Manufacturer on any questions as to the origin of sales and disposition of the Sales Representative's commission is to be conclusive and final.

Art. 6A. On orders by the Sales Representative which are accepted by the Manufacturer for the purchase by the Sales Representative of Thermo-switches which are for resale in its territory and are listed in the Manufacturer's price list, the Sales Representative shall receive a discount of 50% and 10% computed upon list prices with established discounts, shipped f.o.b. Ashland, Massachusetts. The Sales Representative shall be allowed to charge his customers the transportation charges from Ashland, Massachusetts, providing they do not exceed 5% of the Manufacturer's net list prices, f.o.b. Ashland, Massachusetts.

Art. 6B. On the sale at net prices to customers in the Sales Representative's territory of special Thermoswitches or other special items, whether or not in the Manufacturer's catalog, the Sales Representative is to be allowed a commission of 15% of the net price.

Art. 6C. If and when any special Thermoswitch

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 10—(Continued)

or other item referred to in 6B is made a standard catalog item so that its price is changed from net to list, the commission or discount shall be the same as is provided for in Art. 6 or 6A.

Art. 7. Commission paid on accounts that default payment will be debited to the Sales Representative's commission account.

Art. 8. The relationship of the parties to this contract is not that of employer and employee, and nothing herein shall be construed as creating such relationship between the Manufacturer and the Sales Representative.

Art. 9. This agreement shall continue in force until terminated by either party, but may be terminated by either party giving notice by mail addressed to the last known address of the other party of its or his decision that the contract shall terminate on a date at least thirty (30) days after the date of mailing the notice. As to orders obtained by the Sales Representative and accepted by the Manufacturer at any time before the termination of this agreement, commissions will be paid only upon goods ordered to be delivered on or before the date of termination. No commission is to be paid with respect to any other goods covered by such orders. At the termination of this contract, the Sales Representative agrees to return to the Manufacturer all samples, papers, price lists, or belongings of the Manufacturer which may be in

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 10—(Continued)

the possession of the Sales Representative at that time.

Art. 10. This contract was made and executed in the State of Massachusetts and is to be construed and interpreted under the laws of that State.

In Witness Whereof, the Manufacturer has caused this agreement to be executed in its name by its duly authorized officers, and the Sales Representative has hereunto set his hand the day and year first above written.

Attest:

FENWAL INCORPORATED,

By

J. M. Storkerson, General
Manager.

MONTGOMERY BROTHERS,

By

Witness:

.....

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Was there a reply to those communications? A. There was.

Q. I show you a letter on the letterhead of Montgomery Brothers dated February 14, 1949, ad-

(Testimony of John M. Storkerson.)

dressed to Mr. John Storkerson, Fenwal, Incorporated, signed Montgomery Brothers by W. Ray Montgomery, and ask you if you received that reply to your communications of February 4th and February 9th? A. I did.

Mr. Doyle: I offer the document identified as Plaintiff's Exhibit next in order, 11.

The Court: Admitted.

The Clerk: Plaintiff's 11.

(Letter February 14, 1949, Montgomery to Fenwal, marked "Plaintiff's Exhibit No. 11" in evidence.)

PLAINTIFF'S EXHIBIT No. 11

Inter-office Correspondence

From

Montgomery Brothers
San Francisco 3

February 14, 1949

To: Fenwal Incorporated.

Subject: General.

Attn: Mr. John Storkerson

Dear John:

This will acknowledge receipt of your letter of February 4, 1949, as well as your letter of February 9, 1949, containing a proposed new Sales Agreement.

Without in any way receding from the position outlined in our letter of January 7, 1949, and

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 11—(Continued)

purely by way of compromise, we are willing to accept the proposal outlined in your letter of February 4, 1949, and the Sales Agreement dated February 14, 1949, with the following modifications if they prove agreeable to you, otherwise, we are obligated to stand upon our original position.

1.0 Satisfactory.

2.0 All orders for Fenwal products from the territory of Montgomery Brothers which are dated after January 2, 1949, but before March 1, 1949, shall be handled in the following manner:

2.1 All orders dated before March 1, 1949, for shipment into Montgomery Brothers' territory other than the Los Angeles area or Southern California territory shall be handled as outlined in 1.0 above, except with revised discounts.

2.2 On all orders dated January 2, 1949, to March 1, 1949, for shipment after March 1, 1949, into Los Angeles area or Southern California territory, Montgomery Brothers are to receive an amount equal to 50% of the amount they would have earned had the original Sales Agreement not been terminated.

2.2.1 On all orders where shipments are to be made after March 1, 1949, into the Los Angeles area or Southern California territory, Montgomery Brothers are to re-

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 11—(Continued)

quest permission of the customer to assign the orders to Fenwal Incorporated, and if permission is given, shall assign such orders to Fenwal Incorporated at once.

2.2.2 Satisfactory.

2.2.3 Satisfactory.

3.0 Eliminate.

4.0 Satisfactory.

Sales Agreement dated February 14, 1949, at Ashland, Massachusetts, satisfactory with the following exceptions:

Art. 4. All orders presented by Montgomery Brothers up to and including the expiration date of this Agreement for standard Thermoswitches and for all special Thermoswitches that have heretofore been used for the same or similar application and proven satisfactory, are to be accepted by the Manufacturer and shipments are to be made as specified on the order, regardless of release dates. All sales by said Representative shall be at prices furnished by the Manufacturer. It is expressly understood that no device or arrangement shall be entered into by the Sales Representative with any customer which shall in any way result in sales below the scheduled prices as supplied by the Manufacturer from time to time.

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 11—(Continued)

Art. 5. Eliminate.

Art. 6. Products shall be sold f.o.b. Ashland, Massachusetts. If for any reason customers in the Sales Representative's territory desire to purchase direct from the Manufacturer, then commissions will be paid on the net f.o.b. prices of standard catalog products at Ashland, Massachusetts, in accordance with the varying schedule of discounts granted to individual customers as follows:

(Balance of Art. 6 satisfactory.)

Art. 6A. On orders placed by the Sales Representative for resale in their territory that are listed in the Manufacturer's price list, the Sales Representative shall receive a discount of 50/10% computed upon the list prices with the established discounts, shipped f.o.b. Ashland, Massachusetts. The Sales Representative shall be allowed to charge his customer the transportation charges from Ashland, Massachusetts, provided they do not exceed 5% of the Manufacturer's net list price f.o.b. Ashland, Massachusetts.

Art. 6B. On the sale at net prices to customers in Sales Representative's territory of special Thermoswitches or other special items which are not in the Manufacturer's catalog, the Sales Representative is to purchase same on a basis of net price established by the Manufacturer less a dis-

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 11—(Continued)

count to the Sales Representative of 15% of the net prices f.o.b. Ashland, Massachusetts.

Add—

Art. 6D. On the sale at net prices to the Boeing Airplane Company on Special Thermoswitches or other items, whether or not in the Manufacturer's catalog, the orders are to be taken in the name of the Manufacturer and the Sales Representative is to receive a commission of 15% payable as provided for in Art. 6.

Art. 9. This agreement shall continue in force for a period of one year from date, with the understanding that 60 days prior to termination, notice shall be given to Sales Representative that the Agreement can be renewed on the same terms for a like period, or, a new Agreement can be negotiated by the parties hereto that will be mutually satisfactory. If, however, the contract is terminated, it is understood that all orders placed with the Manufacturer by the Sales Representative prior to the termination date, for standard Thermoswitches and for all special Thermoswitches and other items that have heretofore been used in the same or similar application and proven satisfactory, are to be accepted and shipped, regardless of shipping schedule appearing on the order.

I sincerely hope that these suggested changes will be acceptable so that we can continue our pleasant

(Testimony of John M. Storkerson.)

Plaintiff's Exhibit No. 11—(Continued)

business association, for I know that it can be made mutually profitable.

Yours very truly,

MONTGOMERY BROTHERS,

/s/ W. RAY MONTGOMERY.

WRM:da

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): I direct your attention, Mr. Storkerson, to the fact that this three-page communication bears the date on [49] the first page February 14, and on the two succeeding pages in the upper right hand corner, February 15. Did that dating appear on it when you received it?

A. It did.

Q. I also direct your attention to a red stamp, "Feb. 21, 1949," and ask you if you know when that stamp was placed upon the communication?

A. That stamp appears to be the stamp we normally use on all incoming mail as received.

Q. So you would say it was received in your office on February 21, 1949? A. Correct.

Q. I direct your attention to another letter dated February 16, 1949, from Montgomery Brothers addressed to Fenwal, attention Mr. J. M. Storkerson, and ask you if you received that letter in the regular course? A. I did.

(Testimony of John M. Storkerson.)

Q. Again directing your attention to the stamp "Feb. 21, 1949," do you identify it?

A. As the same type of stamp as the other one.

Q. Does that mean that that communication was received in your office upon the same date as the prior communication? A. Yes, it does.

Q. I direct your attention on the first line of this letter to the fact that the date February 15th has been encircled [50] and "14" placed in lieu thereof. Did you do that?

A. I couldn't be sure.

Q. The reference apparently is to the Montgomery letter of the 15th—

A. That is right.

Q. —or of the 14th, bearing the date "14" on the first page, and the 15th on each of the two succeeding pages? A. That is right.

Mr. Doyle: I offer the document as Plaintiff's exhibit 12.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 12.

(Letter dated Feb. 16, 1949, Montgomery to Fenwal, marked Plaintiff's Exhibit No. 12, in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 12

Inter-office Correspondence

From

Montgomery Brothers
San Francisco 3

Airmail

February 16, 1949

To: Fenwal Incorporated.

Subject: General.

Attn: Mr. J. M. Storkerson

Dear John:

14th

On reading Ray's letter of February 15th, I think that paragraph under 2.1 can be clarified, and I suggest that you substitute the following, marked 2.1, for the same paragraph in Ray's letter of February 15th:

2.1 On all orders dated January 2, 1949, to March 1, 1949, and shipped into Montgomery Brothers' territory prior to March 1, 1949, shall be handled as outlined in 1.0 above. All orders shipped after March 1, 1949, will be handled as outlined in new Sales Agreement dated February 14, 1949, or later.

Ray was in such a hurry to get away that I am sure if he had carefully considered this paragraph under discussion he would have made the change prior to the letter going out.

(Testimony of John M. Storkerson.)

We are looking forward to receiving a new Sales Agreement embodying the changes that we have suggested, and can assure you that we will not curtail any of our efforts in promoting the sale of Fenwal equipment on the Pacific Coast.

With kindest regards from the writer, we remain

Yours very truly,

MONTGOMERY BROTHERS,

/s/ F. H. MONTGOMERY.

FHM:da

cc reg. mail

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Were there any oral communications between you on the one hand and either of the Montgomery Brothers on the other at or about the time of the two communications in writing that you have just identified?

A. During that period—exactly when, I can't remember—there were one, probably two or more telephone discussions with the Montgomery Brothers.

Q. What was the subject matter of those conversations as best you recollect them?

A. Well, the principal thing I remember is a rather prolonged discussion relating to— [51]

Mr. Christin: May I ask who was the conversation with?

(Testimony of John M. Storkerson.)

A. I don't remember; either Mr. Ray or Mr. Fred Montgomery, but one of them.

Q. And about the date?

A. Some time around the 9th to the 15th; in that general area; I can't remember.

Q. Of February? A. Right.

Q: (By Mr. Doyle): Was there more than one conversation?

A. As I remember it, there were—there was more.

Q. How many? A. I don't know.

Q. State the substance and purport of them as best you recollect them.

A. The substance was that—the main part of that discussion related to our shipments to Montgomery Brothers where a very strong plea was made to me to make as many shipments as I possibly could immediately and keep them sustained through the 60 day period. And there was some discussion in which the amounts having been shipped were discussed, and I endeavored to give estimates of how much we would have out. And I told them that I was doing everything that I possibly could within our factory to get those shipments out as rapidly and expeditiously as possible. That is all I remember of the substance of [52] them.

Q. Upon receipt of the Montgomery Brothers letters of February 14th or 15th and of February 16th, received by you on February 21, 1949, what action was taken by you at that time?

(Testimony of John M. Storkerson.)

A. Well, I was at work analyzing the letters when I found out that we hadn't received payment on our invoices for January shipments, so that actually I didn't take any further action beyond studying their letters and so forth.

Q. What was the amount of invoices that you were told was unpaid? A. The amount?

Q. Approximately; I won't hold you to the exact figure at this time.

A. Somewheres around twenty thousand.

Q. For January shipments, twenty thousand?

A. Well, twenty to thirty; somewheres in that range. I would have to refer to my records to get it exactly.

Q. Yes. We will get the figure. Then did you communicate with Montgomery Brothers about that fact?

A. I didn't personally. Our Mr. Drew, Controller, wired them to determine whether their check had been sent.

Q. I have obtained from Defendants' counsel and show you herewith, telegram dated February 21, 1949, addressed to Montgomery Brothers, San Francisco, and signed Fenwal, Inc., A. C. Drew, and ask you if that is the communication to which you have referred? [53] A. It is.

Q. Would you read the wire, please.

A. "January check not received. Please advise whether sent. Fenwal, Inc., A. C. Drew."

Mr. Doyle: I offer this document as Plaintiff's Exhibit 13.

(Testimony of John M. Storkerson.)

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 13 in evidence.

(Telegram dated February 21, 1949, Fenwal to Montgomery, marked Plaintiff's Exhibit 13 in evidence.)

PLAINTIFF'S EXHIBIT No. 13

Western Union

[Telegram]

Feb. 21, 1949. 11:55 a.m.

SFAB086 PD-WUX. Ashland, Mass. 21 237P

Montgomery Bros., Attn. Mrs. R. J. Roche

1122 Howard St—

January Check Not received. Please Advise
Whether Sent.

FENWAL Inc.

A. C. DREW

[Stamped]: Received February 21, 1949. Montgomery Bros.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): You have testified about the course of conduct regarding payments, and I exhibited to you and you identified and there is in evidence a form of acceptance. I neglected however, to exhibit to you a form of invoice in use between these parties.

I show you a blank form of invoice headed "Fen-

(Testimony of John M. Storkerson.)

wal, Inc.," and ask you if you identify that as the form of invoice customarily in use between you and Montgomery Brothers on shipments made pursuant to their orders and your acceptances?

A. I do.

Q. And directing your attention thereto, as on the acceptance form, "Terms one-half per cent 10—net 30.—F.O.B. Ashland," was that amount changed from 1 per cent to one-half of 1 per cent on or about January 1, 1948, as in the case of the acceptance form? [54]

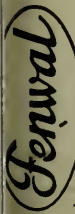
A. Yes.

Mr. Doyle: I offer the identified document as Plaintiff's Exhibit 14.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 14 in evidence.

(Invoice form marked Plaintiff's Exhibit No. 14 in evidence.)



FENWAL INCORPORATED
Ashland, Massachusetts, U. S. A.

ORIGINAL INVOICE

REG. U. S. PAT. OFF.

CUSTOMER'S
ORDER NO.

OUR ORDER
NUMBER

DATE ENTERED

APPROX.
SHIP. DATE

SHIP VIA

SHIP TO -

SOLD TO -

INVOICE NUMBER

INVOICE DATE

PACKING SLIP NUMBER

DATE SHIPPED

HOW SHIPPED

NET WT.

GROSS WT.

BOX DIM.

EXPORT LIC.

IMPORT LIC.

METHOD OF PAYMENT

SALESMAN

TERMS: 1/2% 10 - NET 30 - F. O. B. ASHLAND. INTEREST CHARGED AFTER 30 DAYS

QUANTITY ORDERED	CATALOG NUMBER	SPECIFICATIONS	UNIT PRICE	BALANCE AFTER THIS SHIPMENT	QUANTITY SHIPPED	EXTENSION

12

[Endorsed] FILED IN 11 1955

Q. (By Mr. Doyle): Was this custom or practice to which you have testified respecting payments on the 10th of the month evidenced by any written communications of which you are aware?

A. It was.

Mr. Christin: We will object to the form of the question as calling for the opinion and conclusion of the witness. We have no objection to the document going in. The Court can determine what that means.

The Court: He has already answered that it was.

Mr. Christin: I move to strike it out.

The Court: Denied.

Q. (By Mr. Doyle): I show you, Mr. Storkerson, a letter dated May 20, 1947, on the letterhead of Montgomery Brothers, addressed to Fenwal, Inc., and signed "Montgomery Brothers, R. J. Roche," and ask you if you identify that as a communication respecting payment on the 10th of the month? A. I do. [55]

Mr. Christin: Your Honor, that part of it we object to—"respecting payment."

Q. (By Mr. Doyle): Do you identify the communication as having been received in the ordinary course of business? A. I do.

Mr. Doyle: I offer the document identified as Plaintiff's Exhibit 15 and request the Clerk to mark it accordingly.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 15 in evidence.

(Testimony of John M. Storkerson.)

(Letter May 20, 1947, Montgomery to Fenwal, marked Plaintiff's Exhibit 15 in evidence.)

PLAINTIFF'S EXHIBIT No. 15

Inter-Office Correspondence

May 20, 1947

From

Montgomery Brothers
San Francisco 3

To: Fenawl, Inc.

Subject: Account

Attention: Mr. A. C. Drew, Comptroller

Dear Mr. Drew:

We are attaching hereto our check covering April invoices in the amount of \$10,184.92. Also, replying to your letter of May 16th, we are attaching hereto copies of our remittance advice covering our payment of \$19,190.24.

At the time we sent you our check, we attached copies showing what our payment covered. However, same must have been detached before this reached your desk.

Regarding the second paragraph of your letter of May 16th, we are adding the \$17.10 to our remittance of today.

From the copies of your statements, which we are attaching, covering our payment of \$19,190.24, from which we took 1% cash discount that you are ob-

(Testimony of John M. Storkerson.)

jecting to, if you will refer to these statements you will see that on December 31 you owed us \$22,687.79, in January you owed us \$16,183.98, and in February you owed us \$13,371.62.

We wrote you on January 16th asking that you please send us a check in order to balance the account, as we needed the money at that time to pay taxes, etc. However, according to Mr. Robinson's letter, you were not in a position to do so. Therefore, we were obliged to let this account stand, and we feel perfectly justified now in taking the discount of \$191.90.

We religiously pay all our accounts on the 10th of the month. If we could get your invoices rendered correctly with the correct discount, and also if we could get a statement from you each month by the 10th of the month, we would have your check in the mail every month on the night of the 10th. For instance, the last statement we received from you was for January, February and March. This was not sent us until we requested same. Before that we had not received a statement from you since October. You can readily understand how hard it is to check your account unless we receive your statement each month.

We also note in the third paragraph of your letter of May 16th you are questioning some of the deductions we made, as follows:

Invoice #7-481	\$64.75
Invoice #7-523	64.75
Invoice #7-1375	64.75

(Testimony of John M. Storkerson.)

If you will refer to your latest discount schedules on switches in quantities from 1,000 to 2,499, your discount is 50 and 5%. That is the discount which we must give our manufacturers. We as representatives receive an additional 15%. Therefore, your invoices were rendered less 50 and 10%, whereas they should have been less 50-5-15%. There is, therefore, credit due us on these three invoices of \$64.75 each. This also applies to Invoice #7-2358. There is a credit of \$34.75 due us on that, as this applies to the same purchase order.

The following are also corrections made on your invoices, deductions which we have taken, and we should receive your credit memorandum for these amounts:

Invoice #7-1083: The correct price of these switches is \$9.50, and not \$11.00, as you show on your invoice. There is, therefore, a credit due us of \$35.70. We refer you to Mr. E. B. Pierce's letter of February 19th substantiating this price.

Invoice #7-2454	Less 20%	Credit due—\$.06
Invoice #7-2861	Less 20%	Credit due— 26.10
Invoice #7-2862	Less 20%	Credit due— 8.70
Invoice #7-2863	Less 20%	Credit due— 26.10
Invoice #7-2864	Less 20%	Credit due— 26.10
Invoice #7-2961	Less 20%	Credit due— 17.40
Invoice #7-2962	Less 20%	Credit due— 52.20
Invoice #7-2963	Less 20%	Credit due— 52.20
Invoice #7-2964	Less 20%	Credit due— 52.20

(Testimony of John M. Storkerson.)

There is one old item of November 29, 1945, Invoice #5-8379, of which you still show that we owe you \$248.20. This is definitely not correct. If you will refer to the invoice, you will see you have charged us \$9.25 for S-2223 Thermoswitch. In the past two years we have purchased thousands of S-2223 from you, and our price has always been \$8.40, less 20%.

When you rendered this invoice in 1945, you showed a price of \$9.25, less 50 and 10%. Your invoice called for \$1,519.31. It is regrettable that we did not pay your invoice as you rendered it, thereby closing the matter out. However, in our honesty we paid you the invoice in the correct amount of \$8.40 each, less 20%, paying you the amount of \$2,452.80. We would have saved \$933.49 had we not corrected your error. If \$9.25 was the correct price for an S-2223 Thermoswitch, we are wondering why you only allowed us \$8.40 on all the returns that Lockheed made, when we should have gotten credit for \$9.25. Please review your files on this, and delete this old balance of \$248.20 from our account.

With our payment today, we feel that our account is paid in full to May 1st. We also hope that you will see your way clear to send us your statement each month so we can have it by the 10th of the

(Testimony of John M. Storkerson.)

month, and we will see that your check gets in the mail that night.

Very truly yours,

MONTGOMERY BROTHERS,

/s/ R. J. ROCHE.

RJR:is

cc Accounting Dept.

[Endorsed]: Filed July 11, 1950.

Mr. Doyle: Do you have the original, Mr. Christin, of a letter dated June 13, 1947, from Fenwal, Inc., to Montgomery Brothers in response, I believe, to the letter of May 20, 1947, just introduced in evidence?

Mr. Christin: Just a moment. I don't seem to have it here at this time. You may use a copy.

Mr. Doyle: With your permission, I will use a copy and substitute the original if it is located.

Q. I show you, Mr. Storkerson, a copy of a letter dated June 13, 1947, addressed to Montgomery Brothers and signed Fenwal, Inc., and ask you if that communication was sent in the usual course of business? A. It was.

Mr. Doyle: I request that it be marked as Plaintiff's [56] Exhibit 16 and offer the same in evidence.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 16 in evidence.

(Letter dated June 13, 1947, Fenwal to Montgomery, marked Plaintiff's Exhibit 16 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 16

June 13, 1947

Air Mail

Montgomery Brothers

1122 Howard Street

San Francisco 3

California

Attention Miss R. J. Roche

Gentlemen:

I have reviewed the adjustments pending on your account with our Mr. Robinson and the following is the result of our survey.

Invoice 5-8379—Mr. Robinson agrees with you that a \$248.20 credit is due. This will be forwarded shortly.

Debit Memo 264 and 265—These Debit Memos of \$2.27 and \$3.88 respectively, were for the difference in transportation charges between Railway Express and normal transportation. However, we feel that these amounts are due us as your order #3002 specifically stated "Express" and order #2766 did not show any routing and in the absence of specific instructions, we always ship Railway Express. Will you kindly include these amounts in your next remittance?

Invoice 7-2454—We find that the \$.06 deduction by you is in order and we will issue our credit accordingly.

(Testimony of John M. Storkerson.)

Invoice 7-481, 7-523, 7-1375, 7-2358—On each of these remittances you deducted \$64.75, noting that we had rendered them at 50% and 10% discounts whereas they should have been 50%, 5%, and 15%. We find you are correct and will issue our credits to cover same.

Debit Memo 294 and 295—The material covered by these Debit Memos for \$28.48 and \$7.26 has never been received. Will you kindly check as to whether it has been shipped.

Debit Memo 307—We are unable to locate this Debit Memo in the amount of \$4.47. Will you kindly forward a copy of same.

We have not, as yet, received your remittance for May and are wondering if this was sent on the tenth of the month as you had previously stated it would be. We will appreciate your advice.

Very truly yours,

FENWAL INCORPORATED,

A. C. DREW,
Controller

em

cc Mr. C. J. Robinson

Reg. mail

[Endorsed]: Filed July 11, 1950.

(Testimony of John M. Storkerson.)

Mr. Doyle: It is approaching the noon hour, your Honor. I have about two or three of this particular batch. Perhaps it would be convenient to finish those.

Q. I show you, Mr. Storkerson, a letter dated June 20, 1947, on the letterhead of Montgomery Brothers addressed to Fenwal, Incorporated, to which is attached two different Montgomery Brothers debit memorandums and ask you if you identify that communication as received in the usual course of business.

A. I do.

Mr. Christin: There is a notation on the last page there that will not be admitted.

Mr. Doyle: Yes; it may be stipulated, Mr. Christin, that the penciled notes on the credit memorandum need not be regarded as a part of the exhibit.

Mr. Christin: And also on the first page there is some writing at the top of it.

Mr. Doyle: Very well; the pencil writing. However, the date stamp is important.

Mr. Christin: Oh, yes.

Mr. Doyle: Plaintiff's Exhibit 17. I offer it in evidence. [57]

The Court: Plaintiff's Exhibit 17 in evidence.

(Letter dated June 20, 1947, Montgomery to Fenwal, was marked Plaintiff's Exhibit No. 17 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 17

Inter-Office Correspondence

From

Montgomery Brothers
San Francisco 3

June 20, 1947

To: Fenwal, Inc.

Subject: Account.

Attention: A. C. Drew, Controller

Dear Mr. Drew:

We wish to thank you for your letter of June 13th, and are very happy to note that we are getting some of the old charges which you have been showing against our account straightened up. We also wish to advise that our check for the May account was mailed you, as promised, on June 10th, in amount of \$42,438.52. We also wish to state that we will continue to send our check promptly on the 10th of the month if you will see that your statement is mailed to us in time for us to check the bills by that time.

Regarding our Debit Memo 264, we are attaching hereto our Credit 341 cancelling this Debit Memo. However, our Debit Memo 265 we regret we are unable to cancel. We requested this by Railway Express. However, you shipped it Air Express, which was not authorized by us or our customer. Therefore we cannot allow this amount. Air Express amounted to \$4.91, and Railway Express on

(Testimony of John M. Storkerson.)

6 pounds would be \$1.03, Therefore we feel that the difference of \$3.88 should be paid by you.

Our Debit Memo 307 was also shipped by Air Express, which should have been shipped Railway Express. This refers to our P. O. 24667, your S-21992, covering shipment of July 31, 1945, to the Lockheed Aircraft Corporation. For your convenience, we are attaching hereto copy which was sent you in May of this year.

Regarding the material returned on Debit Memo 294 and 295, we have contacted our Los Angeles office as to how and when this material was shipped. We will put a tracer on same, and advise you of our findings.

Trusting that you will check into these remaining Debit Memos and be able to issue us credit as requested, we are

Very truly yours,

MONTGOMERY BROTHERS,

/s/ R. J. ROCHE.

RJR:is

cc Accounting Dept.

(Testimony of John M. Storkerson.)

Montgomery Brothers
Engineers - Manufacturers - Chemists
San Francisco, Calif.

July 30, 1946

Customer's Order No. and Date

Requisition No.

Terms: Cash

Date Shipped

Our Register D/M 307

Ship to and Destination Same

Shipped Via

Shipped From

Sold to: Fenwal, Inc., Ashland, Mass.

All accounts subject to sight draft (with exchange) if not paid when due. Interest will be charged on all overdue accounts at the legal rate of interest.

Debit Memorandum

Charging you with difference in transportation
Your inv 5-7051, 4.47.

attached D/M from
Lockheed Aircraft Corp.

(Testimony of John M. Storkerson.)

Montgomery Brothers
Engineers - Manufacturers - Chemists
San Francisco, California

June 19, 1947

Customer's Order No. and Date

Requisition No.

Terms: Cash

Date Shipped

Our Register D/M C/M 341

Ship to and Destination

Shipped Via

Shipped From

Sold to: Fenwal, Inc., Ashland, Mass.

All accounts subject to sight draft (with Exchange)
if not paid when due. Interest will be charged on
all overdue accounts at the legal rate of interest

Credit Memorandum

Cancelling our D/M 264 March 5, 1946. Shipment
on our P. O. 3002. Difference in Rail Express and
Freight, \$2.27.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): I show you, Mr. Storkerson, a letter dated September 11, 1947, on the letterhead of Montgomery Brothers, addressed to Fenwal, Incorporated, and ask you if you identify that document as received in the usual course of business? A. It was.

(Testimony of John M. Storkerson.)

Mr. Christin: Do you offer it?

Mr. Doyle: Yes, I offer the document in evidence as Plaintiff's Exhibit 18.

Mr. Christin: At this time, may it please your Honor, I object to the materiality of this letter and call attention to the other letters; that it was an attempt to change and alter the terms of a written contract.

The Court: I will have to hear you after lunch.

Mr. Christin: Very well.

(Thereupon a recess was taken until 2:00 o'clock p.m.) [58]

Tuesday, July 11, 1950—Afternoon Session

The Clerk: Fenwal, Inc., vs. Montgomery Brothers, on trial.

J. M. STORKERSON

a witness called for Plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

Mr. Christin: If your Honor please, at the time we adjourned I was about to object to the introduction of Exhibit 18, which is a letter. I object to its materiality if this exhibit and the two prior ones, 17 and 16 are introduced for the purpose of varying the terms of a written contract by a subsequent letter. I will object to it on the further grounds

(Testimony of John M. Storkerson.)

that it isn't in the pleadings. The contract of which they allege a breach is predicated on exhibits 1 and 2, and there is no reference in this complaint of a reformation or extension of the terms of the contract other than included in the pleaded documents.

The Court: Do you desire to make a statement before I rule, Mr. Doyle?

Mr. Doyle: Only to say, may it please the Court, that the contract was executed in May, 1944, and all I am doing with these letters is showing the course of conduct under it and the payments made.

The Court: The exhibits are admitted subject to objection. [59]

The Clerk: Exhibit No. 18 in evidence.

(Letter dated September 11, 1947, Montgomery to Fenwal, was marked Plaintiff's Exhibit No. 18 in evidence.)

PLAINTIFF'S EXHIBIT No. 18

Inter-Office Correspondence

From

Montgomery Brothers

San Francisco 3

Sept. 11, 1947

To: Fenwal, Inc.

Subject: Account.

Attn.: A. C. Drew, Comptroller.

Dear Mr. Drew:

Yesterday we mailed you our check for \$18,791.31 which, according to our records, paid our account in

(Testimony of John M. Storkerson.)

full to August 31. In order to reconcile this with the statement you sent us, showing we owed you a balance of \$28,887.03, we wish to give you the following information:

Invoice 7-5526—\$67.50. You do not have this charged to us on this statement. However, we included this in our remittance of yesterday.

Invoice 7-5807—\$3.83. Kindly send us a copy of this invoice, as we have no record of receiving same.

Invoice 7-5905—\$6,141.25 and Invoice 7-5906—\$2,348.13. These cover shipments made on September 4th. We received the invoices on September 10th. Undoubtedly it was an error on your part in putting these on our August statement, since they cover September shipments, which of course we will pay in our regular September check.

There is also due us \$759.82 which is in dispute, due to not having received the correct discount from you. We do have T. Hayden letter of September 2nd, wherein you are allowing \$29.75. That leaves a balance of \$730.07, which is made up of the first 11 items on your statement under "Open Deductions."

We have written letters on all these amounts, also we took the matter up with Mr. Robinson and Mr. Turenne while they were in San Francisco, and it was understood at that time that they would discuss the matter with you upon their return, and credits would be forthcoming.

On June 6th you sent us your statement for the

(Testimony of John M. Storkerson.)

month ending May 31st. At that time you told us you could not reconcile our account; that it was out of balance \$5.35, and this amount is shown on your statement of May 31st. However, on your statement of August 31st we notice this amount has now increased to \$7.35. However, as we told you in our letter of June 10th, and we also told Mr. Robinson when he was here, that we have no record of any amount like this being due you. Trust that you will check into this further and please delete this from our account before it really amounts to something, as it seems to be going up.

You also show an open credit of \$5.84, which amount does not belong to us. In your letter of June 6th you called this to our attention, and you said that would be taken off our statement. However, we notice you are still carrying this credit on our account. The difference between the \$7.35 charge and the \$5.84 credit is only \$1.51. We trust that you will be able, in some manner, to get this amount off our statement before next month.

You will also note from our statement, which was sent you yesterday with our check, that we had debit memos amounting to \$908.18. No doubt your credits will be rendered and sent to us soon covering these debits.

With this explanation we hope we have made ourselves clear and that before the next month we will get all these matters adjusted, as we like to

(Testimony of John M. Storkerson.)

feel that we have our account in balance each month.

Yours very truly,

MONTGOMERY BROTHERS,

/s/ R. J. ROCHE.

RJR:da

cc acctg

[Endorsed]: Filed July 11, 1950.

Mr. Doyle: May I ask you, Mr. Christin, for the original of that letter? You stated you thought it was not available; you would endeavor to locate it.

Mr. Christin: I didn't bring any correspondence prior to 1948. We will get it at the office and substitute the original for the copy.

Q. (By Mr. Doyle): I show you, Mr. Storkerson, a copy of a letter dated September 17, 1947, from Fenwal, Inc., to Montgomery Brothers, and ask if that letter was sent from Fenwal in the usual course of business? A. It was.

Mr. Doyle: I offer the document identified as Plaintiff's Exhibit 19.

Mr. Christin: We will make the same objection to that, may it please the Court, as we made to the prior offer on the same grounds.

The Court: Admitted subject to objection.

The Clerk: Plaintiff's Exhibit No. 19 in evidence.

(Testimony of John M. Storkerson.)

(Letter dated September 17, 1947, Fenwal to Montgomery, was marked Plaintiff's Exhibit No. 19 in evidence.)

PLAINTIFF'S EXHIBIT No. 19

September 17, 1947

Via Air Mail
Montgomery Brothers
Mr. A. C. Drew
Account

Attention R. J. Roche

Thank you very much for your August check and may I express my personal appreciation for your interest in keeping your account in balance. Under separate cover, we are today forwarding a number of Credit Memos allowing the open deductions shown on your August statement. We are also adjusting the \$7.35 unlocated amount and the \$5.84 credit which do not belong to you. We have also forwarded you duplicate copies of invoice 7-5807, in the amount of \$3.83. With the above adjustments, only three items remain open as of August 31, as follow:

Invoice 7-5807	\$ 3.83
7-5905	6,141.25
7-5906	2,348.13

With regard to the last two items, we are sorry to report that due to the Army inspector's laxness in not getting here until September 4, shipment was not made in August.

(Testimony of John M. Storkerson.)

Our Directors have decided to let the basis of payment stay as it has been in the past. In other words, if you will forward your check by the tenth of the following month, a 1% cash discount will be allowed. However, this 1% is going to be changed for all customers to 1½% on January 1, 1948. Will you kindly make a note of this?

May I express my appreciation again for your cooperation in this matter with the request that on any future deductions, including discounts, you forward your Debit Memo, as this will greatly simplify our checking.

A. C. DREW,
Controller.

cc reg. mail

Mr. C J Robinson

em

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Will you please read the next to the last paragraph of Exhibit No. 19, Mr. Storkerson? [60]

A. "Our directors have decided to let the basis of payment stay as it has been in the past. In other words, if you will forward your check by the 10th of the following month, a 1 per cent cash discount will be allowed. However, this 1 per cent is going to be changed for all customers to 1½ per cent on January 1, 1948. Will you kindly make a note of this?"

(Testimony of John M. Storkerson.)

Q. Were you a director of Fenwal, Incorporated, at the time that letter was written?

A. I was.

Q. Do you know of your own knowledge whether or not the statement made in that paragraph is correct?

A. I do.

Q. Is it a correct statement of what the directors decided to do?

A. It is.

Mr. Christin: If your Honor please, I object to that as not binding on us, and hearsay.

The Court: It is admitted, subject to objection.

Q. (By Mr. Doyle): I show you, Mr. Storkerson, a copy of a letter dated November 24, 1947, to Montgomery Brothers from A. C. Drew, Controller, Fenwal, Incorporated, and ask you if that was sent in the usual course of business?

A. It was.

Q. I call your attention to the fact that stapled to the one-page communication there is a return post card signed "Montgomery [61] Brothers, R. J. Roche," and ask you if you know whether that was received by Fenwal in the usual course of business.

A. It was.

Mr. Doyle: I offer the document identified as Plaintiff's Exhibit 20.

Mr. Christin: Objected to as irrelevant, immaterial and incompetent, not within the issues of the case.

The Court: Admitted subject to objection.

The Clerk: Plaintiff's Exhibit 20 in evidence.

(Testimony of John M. Storkerson.)

(Letter dated November 24, 1947, Fenwal to Montgomery, with attached post card, marked Plaintiff's Exhibit 20 in evidence.)

PLAINTIFF'S EXHIBIT No. 20

November 24, 1947

Montgomery Brothers
Mr. A. C. Drew
Discount Terms

Attention: Mr. Fred Montgomery

As you may wish to notify your customers in advance, we are hereby advising you that on all invoices dated January 1, 1948, and after, our terms will be $\frac{1}{2}\%$ 10 days, net 30, instead of 1% 10 days, net 30. Please change your records accordingly.

Will you kindly acknowledge receipt of this notification, by signing the enclosed post-card and mailing it back to us.

A. C. DREW,
Controller.

em

Enclosure 1

[Post Card]

We have received your notification of the discount change to $\frac{1}{2}\%$ effective January 1.

/s/ R. J. ROCHE,
Montgomery Brothers.

[Endorsed]: Filed July 11, 1950.

(Testimony of John M. Storkerson.)

Q. (By Mr. Doyle): Now after that telegram of February 21, 1949, that you sent to Montgomery Brothers, did you receive a reply?

A. We did.

Q. I show you an original telegram addressed to Fenwal, Incorporated, signed Montgomery Brothers, dated San Francisco, California, February 23rd, and ask you if you identify that as the telegram to which you have testified? A. It is.

Q. Would you read it, please?

A. "Fenwal, Inc., Attention A. C. Drew. Retel prefer to withhold January check until further relations are established as suggested in our letter February"—it has [62] "6 Y 15. Best regards. F. H. Montgomery."

Mr. Doyle: I offer this in evidence as Plaintiff's Exhibit 21 and request that it be marked by the Clerk accordingly.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 21 in evidence.

(Telegram February 23, 1949, Montgomery to Fenwal, was marked Plaintiff's Exhibit No. 21 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 21

Western Union

[Telegram]

Feb. 23

WU7 PD-MK San Francisco, Calif. 23 1100A

Fenwal, Inc.

Attn A. C. Drew

Retel Prefer to Withhold January Check Until
Future Relations Are Established as Suggested in
Our Letter February 6 Y 15. Best Regards.

MONTGOMERY BROTHERS,

F. H. MONTGOMERY.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Did you respond to the wire of February 23rd just identified?

A. We did.

Mr. Doyle: Do you have the original telegram?

Mr. Christin: Of what date?

Mr. Doyle: The 24th, Fenwal to Montgomery.

Mr. Christin: Yes. (Handing document to Mr. Doyle.)

Q. (By Mr. Doyle): I show you an original telegram dated February 24, 1949, addressed to Montgomery Brothers from Fenwal, Incorporated, J. M. Storkerson, General Manager, and ask you if you sent that telegram to Montgomery Brothers on or about its date? A. I did.

(Testimony of John M. Storkerson.)

Q. Will you read it, please.

A. Addressed to Montgomery Brothers.

“Your telegram of February 23 seems to us an attempt to force us to accept your terms for future relationships [63] by withholding payment of amounts admittedly due on February 10. That action leads us to feel that further negotiations with you are useless. Unless February 10th payment made by wire to us by February 25 we must stop shipments and notify customers of reason and arrange to satisfy them on deliveries. If you refuse settlement on basis of Walter’s letter of February 9th we propose arbitration under procedure of American Arbitration Association. Request wire reply on that by February 28th. Fenwal, Incorporated, J. M. Storkerson.”

Mr. Doyle: I will offer the document identified as Plaintiff’s Exhibit 22 and request that it be marked by the Clerk accordingly.

The Court: Admitted.

The Clerk: Plaintiff’s Exhibit 22 in evidence.

(Telegram dated February 24, 1949, Fenwal to Montgomery, was marked Plaintiff’s Exhibit 22 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 22

Western Union
[Telegram]

1949 Feb. 24 PM 2 41

SFAB 184 PD-SA Boston, Mass. 24 515P

Montgomery Bros.

1122 Howard St.

Your Telegram of February 23 Seems to Us an Attempt to Force Us to Accept Your Terms for Future Relationships by Withholding Payment of Amounts Admittedly Due on February 10. That Action Leads Us to Feel That Further Negotiations With You Are Useless. Unless February 10 Payment Made by Wire to Us by February 25 We Must Stop Shipments and Notify Customers of Reason and Arrange to Satisfy Them on Deliveries. If You Refuse Settlement on Basis of Walter's Letter of February 9 We Propose Arbitration Under Procedure of American Arbitration Association. Request Wire Reply on That by February 28.

FENWAL, INCORPORATED,

J. M. STORKERSON,

General Manager.

[Stamped]: Received February 24, 1949, Montgomery Bros.

[Endorsed]: Filed July 11, 1950.

(Testimony of John M. Storkerson.)

Q. (By Mr. Doyle): Did you receive a response from Montgomery Brothers to that telegram?

A. I did.

Q. I show you an original telegram addressed to Fenwal, Inc., from San Francisco, California, February 24th, signed Montgomery Brothers by F. H. Montgomery, and ask you if that is the telegram you received? A. It is. [64]

Q. Would you read it, please.

A. "Contract with you does not provide for payment February 10th. If you interfere with contracts with our customers and or fail to carry out your obligations including deliveries, we will hold you liable for all damages."

Signed "Montgomery Brothers, F. H. Montgomery."

Mr. Doyle: I offer the document identified as Plaintiff's Exhibit 23.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 23 in evidence.

(Telegram dated February 24, 1949, Montgomery to Fenwal, marked Plaintiff's Exhibit No. 23 in evidence.)

PLAINTIFF'S EXHIBIT No. 23

Western Union
[Telegram]

WU2 PD-San Francisco, Calif., Feb. 24 537 P
Fenwal, Inc.

Contract With You Does Not Provide for Pay-

(Testimony of John M. Storkerson.)

ment Feb. 10. If You Interfere With Contracts With Our Customers and or Fail to Carry Out Your Obligations, Including Deliveries, We Will Hold You Liable for All Damages.

MONTGOMERY BROS.,

F. H. MONTGOMERY.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Did you respond to that telegram, Mr. Storkerson? A. I did.

Q. I show you a telegram dated Ashland, Massachusetts, February 25, 1949, addressed to Montgomery Brothers and signed "Fenwal, Incorporated, J. M. Storkerson," and ask you if you sent that telegram on or about its date? A. I did.

Q. Will you read it, please?

A. "The terms on our order acceptances and invoices which you hold are $\frac{1}{2}$ per cent 10 days, net 30 days. Permission to pay the month's billings on the 10th of the following month was per a special agreement made at your request. [65] Also your promises in correspondence and practice clearly indicate your obligation to pay on the 10th. We are anxious to continue shipments to take care of customers. This requires that you make payment immediately per my wire yesterday. Correct date of Walter's letter to February 4th. Fenwal, Inc., J. M. Storkerson."

(Testimony of John M. Storkerson.)

Mr. Doyle: I offer the document identified as Plaintiff's Exhibit 24 and request the clerk to mark it accordingly.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 24 in evidence.

(Telegram dated February 25, 1949, Fenwal to Montgomery, was marked Plaintiff's Exhibit No. 24 in evidence.)

PLAINTIFF'S EXHIBIT No. 24

Western Union

[Telegram]

1949 Feb. 25 AM 10 44

SFAB077 Long PD-WUX Ashland, Mass. 25 21P
Montgomery Bros.
1122 Howard St.

The Terms on Our Order Acceptances and Invoices Which You Hold Are One-Half Per Cent 10 Days Net 30 Days Permission to Pay the Month's Billings on the 10th of the Following Month Was Per a Special Agreement Made at Your Request Also Your Promises in Correspondence and Practice Clearly Indicate Your Obligation to Pay on the 10th We are Anxious to continue Shipments to Take Care of Customers This Requires That You Make

(Testimony of John M. Storkerson.)

Payment Immediately Per My Wire Yesterday
Correct Date of Walter's Letter to February 4.

FENWAL, INC.,

J. M. STORKERSON.

[Stamped]: Received February 25, 1949, Montgomery Bros.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Mr. Storkerson, the reference in that last sentence of this telegram "Correct date of Walter's letter to February 4"—to what does that refer?

A. That refers to a prior notice to them on which the wrong date was used.

Q. What do you mean by a prior notice to them?

A. A prior——

Q. Telegram?

A. I am not sure, Mr. Doyle. As I recall, it was relating to a telegram in which I mentioned and had gone back to Dr. Walter's letter.

Q. Directing your attention to Plaintiff's Exhibit 22 and to the next to the last sentence thereof, reading: "If you refuse [66] settlement on basis of Walter's letter of February 9,"——

A. That's it.

Q. ——"we propose arbitration." Is it that date that you were seeking to correct to February 4th?

A. Correct.

(Testimony of John M. Storkerson.)

Q. In other words, the Walter letter was February 4th and not February 9th?

A. That is right.

Q. Did you receive a reply from Montgomery Brothers to the telegram last identified?

A. I did.

Q. I show you, sir, an original telegram dated February 26, 1949, at San Francisco, California, to Fenwal, Inc., and signed "Montgomery Brothers," and ask you whether that telegram was received by you on or about its date? A. It was.

Q. Will you read it, please?

A. "Retel we are not refusing payment your invoices and never have but we prefer to withhold payment January invoices until sales agreement is signed as per our letter February fifteenth. We are very anxious to continue our very pleasant business relations, but must have sufficient time to protect our large investment in your line. We have never stopped for one minute promoting sales and expect all Fenwal customers to be [67] protected by prompt deliveries. Best regards. Montgomery Brothers, F. H. Montgomery."

Mr. Doyle: I offer the document identified as Plaintiff's Exhibit 25 and request that the Clerk mark it accordingly.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 25 in evidence.

(Telegram dated February 26, 1949, Montgomery to Fenwal, was marked Plaintiff's Exhibit 25 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 25

Western Union
[Telegram]

1949 Feb. 26 PM 3 06

BA075 OA180

O.SFD079 DL PD-MK

San Francisco, Calif. 26 1135A

Fenwal, Inc.

Attn J. M. Storkerson, Ashland, Mass.

Retel We Are Not Refusing Payment Your Invoices and Never Have but We Prefer to Withhold Payment January Invoices Until Sales Agreement Is Signed as Per Our Letter February Fifteenth. We Are Very Anxious to Continue Our Very Pleasant Business Relations but Must Have Sufficient Time to Protect Our Large Investment in Your Line. We Have Never Stopped for One Minute Promoting Sales and Expect All Fenwal Customers to Be Protected by Prompt Deliveries. Best Regards.

Montgomery Brothers,

F. H. MONTGOMERY.

[Endorsed]: Filed July 11, 1950.

Mr. Doyle: Did you receive a reply to that telegram? A. I did—not——

Q. Pardon me. Did you send a reply?

(Testimony of John M. Storkerson.)

A. I sent a reply, that's right.

Q. I show you an original telegram dated February 28, 1949, addressed to Montgomery Brothers, San Francisco, and signed Fenwal, Inc., J. M. Storkerson, and ask you if you sent that telegram on or about its date? A. I did.

Q. Read it, please.

A. "Shall discontinue shipments on your orders which have been accepted by us unless we receive today wire payment of amount due February 10 plus \$17,727.44 on February shipments, plus your agreement to make sight draft payment for future shipments. Unless this done all contracts will be cancelled at close of business today. Fenwal, Incorporated, J. M. Storkerson." [68]

Mr. Doyle: I offer the telegram identified as Plaintiff's Exhibit No. 26 and request that it be marked in evidence.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 26 in evidence.

(Telegram dated February 28, 1949, Fenwal to Montgomery, was marked Plaintiff's Exhibit No. 26 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 26

Western Union
[Telegram]

1949 Feb. 28 PM 12 28

SFAB087 PD-WUX Ashland, Mass. 28 233P
Montgomery Bros.
1122 Howard St.

Shall Discontinue Shipments on Your Orders Which Have Been Accepted by Us Unless We Receive Today Wire Payment of Amount Due February 10 Plus \$17,727.44 on February Shipments Plus Your Agreement to Make Sight Draft Payment for Future Shipments. Unless This Done All Contracts Will Be Cancelled at Close of Business Today.

FENWAL, INC.,

J. M. STORKERSON.

[Stamped]: Received February 28, 1949, Montgomery Bros.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Did you receive any reply to that telegram?

A. As I recall, I did receive a reply.

Q. The last question was whether you received a reply to the telegram of February 28, 1949. I think your answer was that you believed you did. I do not find a record of it. Do you have it with you?

(Testimony of John M. Storkerson.)

A. No, I do not. Actually I don't remember. There was another wire that I thought came in from Montgomery Brothers. I was trying to recall it.

Q. Was there another wire from you to Montgomery at about that time?

A. Yes, I wired them that we had sent a cancelling letter, or something to that effect.

Mr. Christin: Just a moment. Would you produce that, if you have it? I have no such copy with me. I think there was none. I asked the witness if he had it, and he says he hasn't.

The Witness: May I see the last telegram which you asked about? [69]

Q. The last telegram I have here sent by you to Montgomery Brothers is dated February 28, 1949, if you will examine it, please.

A. That's right. Subsequent to that I know we sent a letter of cancellation, and I believe I wired them a cancellation.

Q. I show you a telegram dated March 2, 1949, from Ashland, Massachusetts to Montgomery Brothers, San Francisco, Fenwal, Inc., J. M. Storkerson, and ask you if you sent that telegram to Montgomery Brothers on or about its date? A. Yes, I did.

Q. Will you read it, please?

A. "Regret that your failure to take action under our telegram of February 28th has necessitated cancellation of your contracts with us. Letter following. Best regards. Fenwal, Inc., J. M. Storkerson."

Mr. Doyle: I offer the telegram identified in evi-

(Testimony of John M. Storkerson.)

dence as Plaintiff's exhibit next in order and request the clerk to mark it appropriately.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 27 in evidence.

(Telegram dated March 2, 1949, Fenwal to Montgomery, marked Plaintiff's Exhibit No. 27 in evidence.)

PLAINTIFF'S EXHIBIT No. 27

Western Union
[Telegram]

1949 Mar. 2 PM 12 43

SFAB 100 PD-WUX Ashland, Mass. 2 309P
Montgomery Brothers
1122 Howard St.

Regret That Your Failure to Take Action Under Our Telegram of February 28 Has Necessitated Cancellation of Your Contracts With Us. Letter Following. Best Regards.

FENWAL, INC.,
J. M. STORKERSON.

[Stamped]: Received March 2, 1949, Montgomery Bros.

[Endorsed]: Filed March 2, 1949.

Q. (By Mr. Doyle): I show you a letter, Mr. Storkerson, dated March 3, 1949, from Fenwal, Inc., J. M. Storkerson, General Manager, to Montgomery

(Testimony of John M. Storkerson.)

Brothers, and ask you if you [70] sent that letter on or about its date? A. I did.

Q. Is that the "Letter follows" referred to in the wire?

A. Correct; it is. It is a copy of it.

Mr. Christin: Here is the original, Mr. Doyle.

Mr. Doyle: Thank you. I request that the document identified be marked as Plaintiff's Exhibit 28 and I offer it in evidence.

Q. Is this your signature, Mr. Storkerson, on the end of that letter? A. It is.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 28 in evidence.

(Letter dated March 3, 1949, Fenwal to Montgomery Brothers, marked Plaintiff's Exhibit No. 28 in evidence.)

PLAINTIFF'S EXHIBIT No. 28

Fenwal
Ashland, Massachusetts
Fenwal, Incorporated

March 3, 1949

Air Mail Registered
Return Receipt Requested
Montgomery Brothers
1122 Howard Street
San Francisco 3, California

Gentlemen:

In view of the fact that no reply or payment of amounts admittedly overdue was received as a re-

(Testimony of John M. Storkerson.)

sult of our telegrams of February 28 and that payment was not made in accordance with previous telegraphic requests, it has been necessary to follow through on action in accordance with our wire and cancel all contracts. Balances open on the following orders are cancelled due to your failure to make payment when due on these and other orders which have been accepted:

Order No. 13832

13565

13564

13570

13569

Balances open on the following orders are cancelled due to your failure to make payment as indicated in the preceding paragraph, and in accordance with our telegraphic request:

Order No. 15814

15929

15328

15767

15908

14583

14581

14198

15750

15884

15645

15476

15475

14966

Order No. 14854

14853

14850

14847

14846

14845

14714

14366

14397

14364

14363

14208

15816

15348

(Testimony of John M. Storkerson.)

Order No. 14965

Order No. 15743

14964

14989

14963

14971

14251

14365

13905

14086

13904

15934

13571

15752

13567

14422

13337

15660

13089

15875

13086

14278

13083

15497

The following unaccepted orders are returned herewith:

Order No. 15450

Order No. 15532

15509

15533

15581

15534

15519

15703

15517

15867

15518

15744

14429

15781

15152

15810

15153

15769

15154

15829

15155

15830

15232

15872

15403

15877

15404

15879

15405

15880

15406

15885

(Testimony of John M. Storkerson.)

Order No. 15407	Order No. 15914
15409	15915
15410	15916
15411	15917
15521	15918
15522	15919
15530	15920
15523	15921
15524	15926
15525	15927
15526	15940
15531	15949
15527	15971
15528	15987
15529	15990
15995	16019
15996	16022
15997	16032
15999	16033
16010	16038
16012	16050
	16053

We are also submitting the attached summary statement of your accounts to March 1, on which we request immediate payment in full.

I deeply regret that your action has made it impossible to complete the negotiations on which I thought we were making satisfactory progress.

However, you must have recognized that by withholding payments to us which had nothing to do with

(Testimony of John M. Storkerson.)

those negotiations, you would place us in an absolutely untenable position blocking any further effort to bring the matter to a solution which we hoped could be brought about in a prompt and mutually satisfactory manner.

Best regards.

Very truly yours,

FENWAL INCORPORATED,

/s/ J. M. STORKERSON,
General Manager.

JMS:MM

Encl.

Received March 5, 1949.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Did you receive a wire from Montgomery Brothers following the dispatch of the letter that you have just identified?

A. Yes.

Q. I show you an original telegram dated at San Francisco March 5, 1949, addressed to Fenwal, Inc., signed Montgomery Brothers, and inquire whether that is the wire received by you on or about that date?

A. It is.

Q. Would you read it, please. [71]

A. "Retel March 2 and letter March 3 just received. No amounts are admittedly overdue. You will be held liable in damages for any and all con-

(Testimony of John M. Storkerson.)

tracts that you cancel or for your failure to make all deliveries on all contracts. (Signed) J. M. Storkerson,"—wait a minute; signed "Montgomery Brothers."

Mr. Doyle: The document identified is offered in evidence as Plaintiff's exhibit next in order and ask the clerk to mark it accordingly.

The Clerk: Plaintiff's Exhibit 29 in evidence.

(Telegram dated March 5, 1949, Montgomery to Fenwal, was marked Plaintiff's Exhibit No. 29 in evidence.)

PLAINTIFF'S EXHIBIT No. 29

Western Union
[Telegram]

WU1 NL PD-F San Francisco, Calif., March 5
Fenwal, Inc.

Retel Mar. 2 and Letter Mar. 3 Just Received Mo. Amounts Are Admittedly Overdue. You Will Be Held Liable in Damages for Any and All Contracts That You Cancel or for Your Failure to Make All Deliveries on All Contracts.

MONTGOMERY BROTHERS.

[Endorsed]: Filed July 11, 1950.

Q. (By Mr. Doyle): Was there any further correspondence between Montgomery Brothers and

(Testimony of John M. Storkerson.)

Fenwal, Incorporated so far as you are aware?

A. Not that I remember related to this matter.

Q. Were there any further discussions with Montgomery Brothers on the subject of this contract termination and with respect to your telegram?

A. Yes, there were.

Q. Where did those take place?

A. They took place in Los Angeles over a period of several days.

Q. When?

A. That was in the week of March 7th, and they took place on [72] the 8th, 9th, 10th and 11th.

Q. You came to Los Angeles? A. I did.

Q. Alone?

A. No, I came with—I wasn't alone; I came with Carroll Robinson, who is our Sales Manager.

Q. Your what? A. Our sales manager.

Q. Did you meet the Montgomery Brothers, or either of them at Los Angeles?

A. I met Mr. Ray Montgomery.

Q. Tell us where and when and the circumstances, and what was said as best you recollect it, in your own way? When it was, who was present, and what was said.

A. It was on the morning, as I recall, of the 8th of March, and it—the meeting took place at the offices—purchasing offices of Lockheed Aircraft Corporation at Los Angeles. The circumstances under which met were that I had gone to California; because of the situation that was brought about by the cancellation of the contracts we were—back at

(Testimony of John M. Storkerson.)

the plant were in a difficult situation; we had——

Mr. Christin: If your Honor please, I don't think that is material, or binding on us. I think it was hearsay.

The Court: You may continue.

The Witness: We were lacking in—had our working funds [73] tied up; we had no way of making shipment; we were producing; we were in a situation where if we had continued on, that our working capital would have been bled right out of the corporation. We knew that there were customers on the west coast who were expecting—customers of Montgomery Brothers expecting their orders to be filled, and in case we terminated Montgomery Brothers those customers were expecting to have their contracts completed and shipments made regularly. And of course that was just impossible for us to do. Furthermore, the customers were actually looking for direct shipment in many cases from our plant in Ashland. So I went out to Lockheed Aircraft Corporation to talk over with them the general situation to see how it might be resolved, and fortunately the second morning I learned that Mr. Montgomery was in the offices of the Lockheed Corporation purchasing department; therefore a meeting was arranged between Mr. Ray Montgomery and myself.

Q. (By Mr. Doyle): What occurred, please?

Mr. Christin: Who was present, please?

A. Just Mr. Ray Montgomery and myself alone. We—I met him in the office, and I don't remember

(Testimony of John M. Storkerson.)

the exact discussion except that the question was what was going to be done about the situation. I told him that we were—obviously were not going to and couldn't ship anything more from our plant unless we could expect to be paid for it. And he wanted to know what we should do about it—what we were going to do about it, and I suggested [74] that we arrange for assignments immediately so that the customers could be taken care of and that shipments could be released to the various people who were expecting shipment here on the West Coast. He agreed to that. Therefore—thereafter, I said to him, "Well, in that event, let's call in the people from Lockheed who are directly interested and announce our agreement."

Now, as part of that agreement there—I don't remember exactly when it transpired, whether it was at the time in the office or directly afterwards—Mr. Montgomery said that in connection with these assignments that we had decided to develop, that he would demand a paper from us signed by us which would—I don't know the technical legal term, that he used for it; in any event, it meant by their action assigning that they would not be—would not lose any of their rights against our company, and such a paper was prepared after, as he said, consultation with San Francisco. And after receiving that paper I called our attorneys and discussed the matter with them, and after discussing it with them I said if that was to be the case, it

(Testimony of John M. Storkerson.)

would have to be both ways; that we should be on a fair, equitable position on the paper, to which he agreed. And so the assignment arrangement was executed.

Q. Did you execute such an agreement?

A. I did.

Q. I show you a document dated March 9, 1949, addressed to [75] Montgomery Brothers, 1122 Howard Street, San Francisco 3, California, signed J. M. Storkerson, Fenwal, Inc., March 10, 1949, and W. Ray Montgomery, Montgomery Brothers, March 10, 1949, and ask you if that is the document to which you have referred?

A. That is the document.

Q. That is your signature? A. It is.

Q. Was it signed by Mr. Montgomery in your presence? A. I believe it was.

Q. You say that this document was presented by Mr. Montgomery in the first instance?

A. It was.

Q. And then you said you called your counsel about it?

A. And we had to make a modification.

Q. You mean your counsel in Boston?

A. Correct.

Mr. Doyle: I offer the document identified as the Plaintiff's Exhibit next in order.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 30 in evidence.

(The assignment referred to was marked Plaintiff's Exhibit No. 30 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 30

March 9, 1949

Montgomery Brothers
1122 Howard Street
San Francisco 3, California

Gentlemen:

It is understood and agreed by and between Montgomery Brothers and Fenwal Incorporated that Montgomery Brothers in assigning to Fenwal Incorporated any and all unfilled orders for Fenwal products that it does not constitute a waiver of any of the rights of either Montgomery Brothers against Fenwal Incorporated or Fenwal Incorporated against Montgomery Brothers, arising out of contracts between them.

/s/ J. M. STORKERSON,
Fenwal Incorporated.

Date: March 10, 1949.

/s/ W. RAY MONTGOMERY,
Montgomery Brothers.

Date: March 10, 1949.

[Endorsed]: Filed July 11, 1950.

Mr. Doyle: Mr. Storkerson, will you read exhibit 30, please? [76]

(Testimony of John M. Storkerson.)

A. This is to Montgomery Brothers, 1122 Howard Street, San Francisco 3, California.

“Gentlemen:

“It is understood and agreed by and between Montgomery Brothers and Fenwal, Incorporated, that Montgomery Brothers in assigning to Fenwal, Incorporated, any and all unfilled orders for Fenwal Products that it does not constitute a waiver of any of the rights of either Montgomery Brothers against Fenwal, Incorporated, or Fenwal, Incorporated, against Montgomery Brothers, arising out of contracts between them. (Signed) J. M. Storkerson, W. Ray Montgomery.”

Q. What change was it that you say was made in this assignment after it was presented to you by Mr. Montgomery following your conversation with Boston counsel?

A. If I may see it, I could show you the part that has been changed.

Mr. Christin: We submit that that is in no way binding on us, is hearsay, and incompetent, between them and their counsel.

The Court: He may answer, subject to the objection.

The Witness: The original one merely stated that the agreement here does not constitute a waiver of the rights of either Montgomery—no, of Montgomery Brothers against Fenwal, and said nothing about Fenwal against Montgomery. [77]

Q. And you had that insertion made?

A. Yes.

(Testimony of John M. Storkerson.)

Q. Were assignments then actually executed of the aircraft company orders so that they were assigned over to Fenwal? A. They were.

Q. In each instance?

A. That procedure covered all the major aircraft companies, and in answering I would say that I am not sure assignments were made in all instances although there were different mechanics of handling each one.

Q. Would you say that substantially the same procedure was followed? A. Correct.

Q. Were there any further discussions held with Montgomery Brothers at or about that time?

A. Yes, there were continuing discussions during the week of the 7th while we worked with the various aircraft companies in getting the paper work all straightened out, and making the announcements all through the Los Angeles area, and there were discussions also subsequent to that period.

Q. Where? A. In San Francisco.

Q. When?

A. The first discussions were in Los Angeles.

Q. You have told us about those. Was there a discussion [78] in San Francisco?

A. There was discussion—there was discussion in San Francisco, right.

Q. When?

A. That was on the morning of the 12th.

Q. Who was present?

(Testimony of John M. Storkerson.)

A. At that discussion was Mr. Fred Montgomery, Carroll Robinson and myself.

Q. Where was it?

A. It was at the offices of Montgomery Brothers in San Francisco.

Q. What was said?

A. We said that we were there to discuss with Mr. Fred Montgomery the situation with regard to the rest of the orders which had not been handled by assignment. We said also that we were there for purposes of—well, basically, that is one of the reasons we came in, and a second reason we came in was to talk over with him the possibilities of some final settlement of the whole affair.

When I came into Mr. Montgomery's office he had on his desk a very large stack of small orders.

Q. Aircraft orders?

A. I think mostly industrial, from all over the area. Each individual order might only be worth a few dollars in the total transaction, and his question was, "What are we going [79] to do with all these orders? We certainly are not going to make out an assignment on all of that," which I agreed to; if we couldn't by some way work out—the cost in time of working out assignments on all these individual orders would have been prohibitive. He suggested, "Why don't we go ahead and ship them," and he would agree to pay for them. And I told him at that time that we certainly were not going to make shipment unless we could be sure we were going to receive payment; that he had already with-

(Testimony of John M. Storkerson.)

held more funds than he could possibly ever claim against us, and we were not going to persist in shipping unless we knew that the money would be forthcoming. So at that time I asked for some kind of a guarantee on such orders, under which we would be—which we would require in connection with making shipments, and he asked me—he seemed to be disturbed about that, it was an affront to the credit situation. I explained to him that it had nothing to do with my questioning his credit ability, but I was questioning his willingness to pay. Therefore, it was finally worked out that he would secure a bank guarantee from their bank here in San Francisco guaranteeing the accounts, on which basis we would proceed to make shipments to all—on all of these small orders, and a further stipulation in that connection was, because of the funds withheld, which was the fact that I insisted that we would sell him at their indicated billing price to prevent any further accumulation of funds on their part, which we felt [80] would be grossly unfair, and he agreed to that.

We also had some discussion in connection with the credit arrangements there, and Mr. Montgomery had certain comments to make with regard to the weakness of our company and the strength—comparative strength of theirs, and as I recall had a Dun & Bradstreet report available on our financial condition.

Q. Were those small orders assigned?

(Testimony of John M. Storkerson.)

A. No, they were not. They were shipped under the bank guarantee.

Q. Under the guarantee? A. Correct.

Q. Did that terminate your discussion with Mr. Montgomery?

A. No; I went on to talk to him about the fact that I was very sorry that this situation had developed the way it had, and I couldn't understand their actions in withholding payments. I explained to him, I think quite carefully, how I felt that that was taking the working capital away from a small company with definitely limited working funds and how any such amount as was withheld—it was definitely withheld upon his knowledge, that our plant couldn't exist except for a very brief period of time, we couldn't live with a situation like that and continue to ship; that I felt it was forcing us to accept the terms of their proposal for a new contract—their various proposals that they had made. What I wanted to do was to, if [81] possible, ask him what was the very best proposal he would have to offer to Fenwal on clearing up the entire matter there and forgetting about it.

Q. Was that all?

A. I know that as a result of that——

Q. No, I don't want to know the result of it; I want to know if there was anything else said there.

A. Yes, there was more said. He said that—we argued quite a little bit about what such arrangements might be.

(Testimony of John M. Storkerson.)

Q. Never mind the detail, Mr. Storkerson. If you can, give the substance of the balance of that conversation if you have not already covered it.

A. Well, I said to him that I felt there should be an amount granted Fenwal from what they determined the contract price to be by virtue of the fact that they were not performing services and were not covering the credit, and we discussed the work that was required to sustain these long term contracts. We had a very lengthy discussion with regard to what it actually means to handle these rather complicated orders for the various aircraft companies particularly, and he finally—at the end he made some—he said—he told me what he would be willing to offer, which as I recall, was——

Mr. Christin: If your Honor please, this goes into an offer of compromise. I think that the matter was all adjusted at that time. They had their assignment and they had taken [82] care of these other orders.

Mr. Doyle: He needn't proceed; that is all right, Mr. Christin; he needn't proceed. You needn't object.

Q. You didn't reach any agreement?

A. No.

Q. Did you have any further conversation?

A. No, I went home from there.

Q. You went home?

A. The only agreement we had there was an arrangement for taking care of these small orders under the bank guarantee.

(Testimony of John M. Storkerson.)

Q. Did you have any further discussion with Montgomery Brothers? A. No.

Q. That was the last?

A. That was the last.

Q. Going back to the 60-day period of January and February, 1949, did you make shipments during that period on the orders which had been placed with you by Montgomery Brothers?

A. Yes, on the——

Q. And at the end of January when you sent your bill to Montgomery Brothers, how much showed on that bill?

A. At the end of January it was very close to \$30,000, as I recall it.

Mr. Christin: Have you got copies of the invoices you sent? [83]

Mr. Doyle: I will show you how the invoices will appear. I am not going to offer this, Mr. Christin, but if you want to offer it——

Mr. Christin: All right.

Mr. Doyle: I just wanted you to see it.

Q. I hand you, Mr. Storkerson, what I understand to be the original ledger entries of Fenwal, Incorporated. A. That is correct.

Q. And ask you if you can tell me from the original ledger entries what the amount of the bill was on March 1, 1949, and how you determine that from those entries.

Mr. Christin: If your Honor please, we submit respectfully that the invoice itself is the best evidence.

(Testimony of John M. Storkerson.)

Mr. Doyle: I haven't got the invoices.

Mr. Christin: I have a copy of it.

Mr. Doyle: May I have the invoice? It was sent to you.

Mr. Christin: If you had asked me to produce it—I haven't it with me.

Mr. Doyle: It was sent to you.

Mr. Christin: It was.

Mr. Doyle: This is the document from which it was prepared.

Mr. Christin: I will have it in the morning. You didn't ask for it today. If you have a copy, I have no objection to using the copy. [84]

Mr. Doyle: This is the document from which it was taken. I would like to get the witness' testimony.

Mr. Christin: All right; that is all right.

Mr. Doyle: You have the original.

Mr. Christin: Very well.

Mr. Doyle: Proceed, Mr. Storkerson, if you please.

A. The amount due us at the close of business of February—I believe you said March 1st——

Q. Tell us what you have got there, how it was prepared, and how you read those figures.

A. We have an automatic bookkeeping system under which when a shipping document comes up to the accounting department against which we make a bill, this machine takes one of these ledger cards and they bill and duplicate the information on

(Testimony of John M. Storkerson.)

both cards, so at any given moment what you see on here should be an exact duplicate of any bill that we issue. They are made simultaneously.

Q. So that the bill that went forward in February for January was made up from the entries on that ledger? A. Correct.

Q. Is that correct? A. That is correct.

Q. Now will you please state what was due at the end of January and what was due at the end of February?

A. All right. Let me give you at the end of February first. [85] That is \$48,082.79.

Mr. Christin: Again, please.

A. \$48,082.79.

Q. (By Mr. Doyle): At the end of January?

A. January 31, \$30,359.53.

Q. Was a statement in the latter amount sent to Montgomery in the usual course of business in the early part of February prepared from the document you hold in your hand? A. Yes.

Mr. Doyle: I understand, Mr. Christin, that you will produce that document at your convenience.

Mr. Christin: Yes, sir. I will not produce a document in that amount; I will produce the invoices but not in that amount.

Q. (By Mr. Doyle): The amount due at the end of February was reduced thereafter?

A. It was, yes.

Q. To what extent and in what manner?

A. It was reduced—it was reduced to \$46,620.70.

Q. How?

(Testimony of John M. Storkerson.)

A. That is made up of a series of credit memorandums which are listed here under a column called "Credits." Those credit memorandums are related to adjustments of transactions previously made in several ways. Some examples are as follows: It could be an error may have been made which required correction, material may have been shipped back against a given order by a customer—and there were a number of such adjustments [86] that are common to this business.

Q. When was your last credit entry made?

A. July 29th.

Q. Of what year? A. 1949.

Q. That is a year ago? A. That is right.

Q. What was the balance upon the entry of the last credit memorandum? A. \$46,620.70.

Q. What is the balance today?

A. The balance today——

Q. Has that remained unchanged?

A. This remains unchanged, correct.

Q. Has any of it been paid?

A. None has been paid.

Mr. Doyle: Your witness, Mr. Christin.

The Court: We will take a recess before cross-examination.

(Recess.)

(Testimony of John M. Storkerson.)

Cross-Examination

By Mr. Christin:

Q. Mr. Storkerson, how long did you say you were connected with the Fenwal Company?

A. I joined Fenwal in February, 1945.

Q. And what was your training prior to that time? Are you an [87] engineer or a public relations man or a finance man?

A. I was a graduate of the University of Minnesota in Electrical Engineering, was a graduate of the Harvard School of Business. After that I joined the Westinghouse Electric & Manufacturing Company as a sales engineer, salesman and purchasing agent.

Q. What was your capacity as far as your duties were concerned in 1948 and 1949?

A. General Manager.

Q. What is that? A. General Manager.

Q. And you had what functions in that capacity? A. I beg your pardon?

Q. What functions did you have in that capacity? What did you do?

A. I was the manager in charge of some five or six men on different occasions who had charge of the various operations of the business; in other words, to manage the business and develop sales.

Q. Who is Dr. Walter?

A. Dr. Walter is Dr. Carl Walter; he is the President of the Company.

(Testimony of John M. Storkerson.)

Q. He is a physician and surgeon, isn't he, practicing? A. That is correct.

Q. He is a Professor of Harvard University of Medicine? A. Correct. [88]

Q. You were telling us about the procedure when an order came in, and as I understand it an order would come from Montgomery Brothers and then it would be accepted by Fenwal, is that correct?

A. It went through the process of acceptance.

Q. There was one acceptance upon receipt of the order, then the order was further processed and then a second acceptance was sent to Montgomery Brothers, is that correct? A. That is correct.

Q. And that was done during the entire time of your business relationships with Montgomery Brothers, is that correct?

A. To the best of my knowledge.

Q. At any time can you recall, did you refuse to accept an order when lodged by Montgomery Brothers?

A. At the outset of a number of orders we were required corrections before we would accept them.

Q. Well, they were corrected and then accepted, is that correct? A. Correct.

Q. What would be the nature of the exceptions which you had in order to have the order corrected?

A. As I remember, there could be—there were problems, technical problems relating to specifications, correctness of the order as it was entered; it

(Testimony of John M. Storkerson.)

could be a matter of price—such things as [89] that.

Q. And when those matters occurred you would deal directly with Montgomery Brothers to adjust those matters and they would not be taken up with the actual consumer, is that correct?

A. Correct.

Q. Did you have any direct contact during these times when the order was going through the process with the consumer?

A. Me personally?

Q. No, I mean your organization.

A. Yes, we did.

Q. In what way?

A. We made a number of calls to the various customers throughout this Coast which were technical in nature, to assist Montgomery Brothers in connection with certain specialized problems.

Q. I am not referring to that; I mean when the order was sent to you by Montgomery Brothers and at the time of acceptance or prior thereto, for any irregularity in the order as to, as you say, some mechanical situation or electrical problems, would you confer with the customer to rectify that situation, or would you take it up with Montgomery Brothers directly?

A. We would take it up with Montgomery Brothers.

Q. Can you give me any instance at all in your experience with Montgomery Brothers in which you refused to accept an order asking some minor

(Testimony of John M. Storkerson.)

adjustment or some technicality, whether it was engineering problem or price? [90]

A. Not that I know of.

Q. What was done with reference to delivery dates when an order came in? Would the order as it came in have the delivery date specified, or would that be determined after the order was accepted by you?

A. To the best of my recollection, on most orders coming in there would be a request of delivery.

Q. And in some instances you stated that due to your production line you would have to check up with your production line to see whether you could handle some particular order; is that correct?

A. That would be true of practically all the orders.

Q. How long a time would expire on the average between the time you accepted the order and sent out the first acceptance and the time you sent out a second acceptance, normally?

A. It is hard to say; it might be a few days; it might be two weeks; it might be longer.

Q. Did you ever, prior to the month of January, 1949, refuse to accept all orders in their entirety?

A. I don't know whether we did or not.

Q. Well, you are the general manager. Don't you know that situation?

A. I don't know of any such instance.

Q. Now, then, you said that the order would be processed and one copy of the order would go to the

(Testimony of John M. Storkerson.)

finance or the credit department, is that [91] correct? A. Correct.

Q. Each and every order of Montgomery Brothers was checked for their credit; is that correct?

A. It went through the same process.

Q. Hadn't Montgomery Brothers established a line of credit long prior to that time so as not to have each individual order processed for credit?

A. All orders go through that procedure regardless of the fact that they may have an established rating on the card.

Q. Did you have Montgomery Brothers' established rating on a card?

A. In the case of Montgomery Brothers they were well enough established that we had the card.

Q. What was the rating on that card?

A. That card was not filled in, because it was the accepted practice——

Q. In other words, at some time during the course of your contact with Montgomery Brothers prior to January 1, 1941, they had established with you a line of credit? A. They had.

Q. To your satisfaction?

A. That is correct.

Q. Do you know to what extent that line of credit—the maximum was for the given months of 1948? By that I mean what were the [92] invoices that were sent out at the end of any given month of the year 1948?

A. I don't understand your question.

Mr. Christin: Strike that, then.

(Testimony of John M. Storkerson.)

Q. During the year 1948, what was the highest amount of any invoice that was sent to Montgomery Brothers for any given month?

A. I don't know.

Q. Have you any books or records here to show that? A. I could find it from the records.

Q. Well, if I asked you if it appeared to be true, would you say that in September the billing was \$36,400; October, \$34,648; November, \$34,000; December, 1948, \$30,488—does that sound reasonable to you or in keeping with the books as you now remember them?

A. It doesn't sound unreasonable.

Q. At any time during those months was any notification given to Montgomery Brothers that that credit had been impaired in any way so far as your credit standing was concerned?

Mr. Doyle: Mr. Christin, it is stipulated that their credit was good and that they regularly paid their bills up until the time of this particular occurrence about which we complain.

Mr. Christin: Very well.

Mr. Doyle: So that that examination is unnecessary. If you wish to pursue it—— [93]

Mr. Christin: I do not, as long as I get the stipulation.

Q. In 1942 were you connected with the Company? A. No.

Q. You went there in 1945? A. Correct.

Q. Can you state in fractions what proportion

(Testimony of John M. Storkerson.)

of your production was going to Montgomery Brothers and what went to other customers?

A. I would have to check the record on that.

Q. Are those figures available so that they may be produced during this trial?

A. They could be produced.

Q. Do you know in the year 1948 how much of your production went to Montgomery Brothers and how much to other customers?

A. I don't know.

Q. Are those figures available?

A. 1948, yes.

Q. If so, will you please work it out for us?

Mr. Doyle: Well, I won't agree that he work it out. Please don't leave that impresssion, Mr. Christin, because I think it is entirely irrelevant as to how much of the production went to Montgomery Brothers and how much to the other customers. The fact is the contract was subject to cancellation and was cancelled.

Mr. Christin: Yes, but you went into many matters to show the situation with Montgomery [94] Brothers.

Mr. Doyle: We will stipulate that a substantial part of the production of Fenwal went to Montgomery Brothers' customers; exactly what part I am unable to state, and it would be with some difficulty that we could get the records.

Mr. Christin: The witness said he could supply the information. If he can't—I will ask him in the

(Testimony of John M. Storkerson.)

morning. He said he thought he might be able to do it. If available without too much work, I would like to have it.

Q. During the January and February months of 1949, some of the orders which had been lodged by Montgomery Brothers were accepted, is that correct?

A. During the months of January and February.

Q. —February, 1949?

A. Yes, I believe that is right.

Q. And some were not accepted?

A. That is right.

Q. Was there any reason why you took some and not the others?

A. As I remember, the orders which were accepted were those on which shipment would be made during the termination period and on which we were prepared at that time to offer Montgomery Brothers their full profit.

Q. Well, during the termination period did you refuse to accept any orders which would not be filled and delivered prior to March 1, 1949?

A. Did we refuse to accept orders that would be filled and [95] completed before March 1st?

Q. After March 1, 1949.

A. The orders that we did not accept were the ones where shipment ran beyond the termination period.

Q. You accepted no orders then for delivery where delivery was after March 1, 1949?

(Testimony of John M. Storkerson.)

A. I can't answer to a hundred per cent, but in general I think that is true.

Q. At the time that this termination notice went out, did you participate in its preparation?

A. Yes.

Q. I read from the notice: "This will notify that we elect to terminate"—this was dated December 29, 1948. "This will notify you that we elect to terminate our agreement with you dated May 26, 1944, as amended by our agreement dated October 11, 1946, this termination to be effective 60 days after the receipt by you of this letter." Did you dictate this letter or was it dictated by someone else?

A. As I remember, that was handled by the President of the Company.

Q. Were you consulted as General Manager before this letter went out as to its contents?

A. I was aware of its preparation and its contents.

Q. I call your attention to the language, "This termination to be effective 60 days after receipt by you of this letter." [96] Can you explain to me what you meant by those words?

A. It not being my letter basically, except to be aware of the general intent behind it—

Q. And what was that?

A. To effect the termination under the agreement that we had with Montgomery Brothers.

Q. Isn't it a fact that the agreement would con-

(Testimony of John M. Storkerson.)

tinue in full force and effect and it was to be lopped off on the 60th day?

A. I am sorry; would you ask that question again?

Q. I will ask you in this way: Is it not your understanding that for the 60 days during this period that the contractual relationship of the parties would continue and it would terminate at the end of the 60th day?

Mr. Doyle: That calls for the conclusion of this witness on a question of law as to the duration of the agreement and the sufficiency of the notice. The notice was either sufficient or not, and the termination is admitted in the answer to the complaint. There is no dispute that the agreement was terminated.

Mr. Christin: I am asking as to what his understanding was.

Mr. Doyle: You are asking him for his legal conclusion of the contractual relationship.

Mr. Christin: I am asking for his understanding.

Mr. Doyle: I object to the question upon the ground that it calls for a conclusion of the [97] witness.

Mr. Christin: I am asking the witness to tell me what he understood the contractual rights of the parties, to be, not legally, but his understanding during this 60 day period. He was going to do what, and under what conditions or circumstances.

The Court: He may answer.

(Testimony of John M. Storkerson.)

A. Well, from a legal point of view, I don't know. It was my intent to go ahead and work with them under our normal arrangement for a 60 day period.

Q. (By Mr. Christin): Was it normal for you to refuse to accept orders prior to this 60 day period? You had accepted all orders prior to that time, hadn't you?

A. I am sorry; I don't understand you.

Mr. Christin: If your Honor please, I lost a tooth yesterday, so I will apologize to the Court.

The Court: I lost all mine years ago.

Mr. Christin: Maybe I am not accustomed to this loss at the present time.

Q. I will ask you this again: Prior to the months of January and February of 1949 had you at any time refused to accept orders?

A. Not to my knowledge.

Q. And I am correct in saying there was a change in the procedural matters under that contract in January and February you did not have prior to that time?

A. I presume it is. [98]

Q. Had you prior to January 1, 1949, advised Montgomery Brothers of your limited capital to carry on an operation and that the sum of \$30,000 would cause you financial embarrassment, if you had outstanding receivables of \$30,000 you would be embarrassed financially? Had you advised Montgomery Brothers of that situation?

A. That was out of my sphere.

(Testimony of John M. Storkerson.)

Q. So far as you know, they were not advised?

A. I don't know.

Q. But you didn't advise them as general manager?

A. No, sir, to the best of my knowledge.

Q. Well, did you or didn't you?

A. I don't remember explicitly.

Q. After any exchange of telegrams, you asking for an appointment to San Francisco and they saying they would like to see you arrive in San Francisco—is that correct? A. Yes, sir.

Q. And that brings us to the office of Montgomery Brothers on the morning of January 24, 1949? A. Right.

Q. Will you tell me who was present when you came into that office that morning?

A. My best recollection, when I first got into it was that Fred Montgomery was there.

Q. And then Ray Montgomery appeared, is that right? [99] A. As I recall.

Q. That conversation, that conference, lasted for two days? A. That is right.

Q. On and off during the two-day period?

A. That is right.

Q. Did I understand you to say that at one time Fred Montgomery would be in the office and another time Ray Montgomery, is that right? They would leave the office, and go into their private offices for some private business; isn't that correct?

A. On occasions I remember that occurring.

Q. Will you recall, please, exactly what you now remember was the first thing said by you or either

(Testimony of John M. Storkerson.)

of the Montgomerys when you came into the office after the usual salutations or greetings?

A. I have a recollection of Mr. Fred Montgomery, I believe, asking me what this cancellation was all about.

Q. That is the first thing you remember?

A. That is the first thing I remember.

Q. But you, as a matter of fact, remember that in no uncertain language, which I do not desire to use at this time, that Ray Montgomery said to you, "What the blank blank do you mean stealing my employee in Los Angeles, Hawkins?"

A. I don't remember that as being his opening statement.

Q. Was that statement at near the opening of the conversation?

A. It could have been; I don't know. [100]

Q. Was it made at all during any part of the conversation?

A. That specific statement?

Q. No, sir; to that effect; substantially, in other words?

A. I remember something of the sort.

Q. What did he say?

A. I don't remember beyond the inference that we had taken Hawkins.

Q. Was it an inference or was it a direct charge?

A. It may have been a charge; I don't remember.

Q. Didn't it impress you at the time?

A. No.

Q. What did you say when he accused you of having stolen Hawkins, if you recall? By "he" I mean Ray Montgomery.

(Testimony of John M. Storkerson.)

Mr. Doyle: What is that question?

Mr. Christin: By "he" I mean Ray Montgomery.

Mr. Doyle: What is the question?

Q. (By Mr. Christin): Just what did you say when Ray Montgomery stated something pertaining to your having stolen or taken away or caused Mr. Hawkins to leave their employ? What did you say?

Mr. Doyle: Just a moment, please. If the Court please, this interrogation goes beyond the scope of the direct examination. It is directed at the question of the cross-complaint, as to which I have a motion to dismiss on the ground that it fails to state a claim.

On direct examination there was no inquiry made with respect to the employment by the Plaintiff Fenwal. That interrogation [101] is open to Mr. Christin in presentation of his own case; it is not open to him on the Plaintiff's case in chief.

Mr. Christin: If Your Honor please, I have practiced some 30 years.

The Court: So have I. The objection is overruled.

Mr. Christin: The conversation, please.

The Court: Answer the question.

The Witness: If I may have the question again.

The Court: What was said to you about Hawkins—stealing Hawkins?

A. I don't remember what I replied to that.

Q. (By Mr. Christin): Well, may I ask you if

(Testimony of John M. Storkerson.)

you recall just about how long in time—five minutes, ten minutes or twenty minutes was spent on discussion of the Hawkins situation?

A. I don't remember.

Q. I want to get from you specifically your best recollection of what was said by you, Fred or Ray Montgomery with reference to the Hawkins situation that day, as you now recall it?

A. As I recall it, at the outset when the first remarks were made by one of the Montgomery brothers regarding Hawkins, I suggested that we defer that discussion until later during our discussions. As I recall, we didn't lengthen it at that particular moment or time.

Q. Did you at that time state to them, "Yes, we have hired Hawkins"? [102]

A. I did not.

Q. You did not. Did you deny that you had hired Hawkins and state "No, we didn't hire Hawkins"?

A. I told them that we didn't hire Hawkins during that conference; I don't know whether it was at that particular time.

Q. I mean during these two days?

A. I told them during these two days that we hadn't hired Hawkins.

Q. Did you at that time know that Hawkins had resigned on the 1st of January or 2nd of January?

A. I was aware of it.

Q. Did you discuss that situation: You knew

(Testimony of John M. Storkerson.)

that Hawkins had resigned, at the time of that conference?

A. As I recall—I don't know whether we did; I think that was probably brought up by Montgomery Brothers.

Q. Well, that is all you recall was said about Hawkins, anyway. You have told us everything you remember?

A. That is all I remember at the moment.

Q. Do you remember whether the letter Exhibit No. 8 was handed to Montgomery Brothers or one of them before or after the Hawkins episode?

A. The letter—may I see the letter?

Q. Yes, certainly.

Mr. Doyle: Show him the letter please, Mr. Christin.

Mr. Christin: Oh, yes, I beg your pardon. (Handing paper [103] to witness.)

A. I don't remember whether it was handed him before or after. As I recall, it was early in the day.

Q. Did you just pull out the letter and say "Here is a letter from Dr. Walter"? Or were there any preliminaries in the conversation before you handed them this letter, Exhibit 8?

A. My best recollection—

The Court: Let me read it while you have it in your hand. Go ahead with your answer.

A. My best recollection is that I produced the letter based on the questions of Montgomery Brothers as to what the cancellation was all about.

Q. Which one said that, do you remember?

(Testimony of John M. Storkerson.)

A. I don't remember which one.

Q. Well, what did you say?

A. I said "This is Dr. Walter's letter" and then I produced the letter and gave it to them to read as being an answer to their question.

Q. Then was there a suspension or lull in the conversation while they read the letter?

A. There was.

Q. After they had read the letter, tell us your recollection of what was said by them and by you with reference to the letter.

A. Well, I recall that they questioned the letter. They tried to find other reasons for the cancellation. I think there [104] followed a discussion of their business relations with Fenwal.

Q. Well, with reference to the first paragraph: "We see no reason why you should be surprised by our action, as we have repeatedly brought to your attention the fact that we have not been satisfied with your representation of us in the territory covered by our agreement." A. Yes.

Q. Was that discussed?

A. I don't remember at the moment.

Q. Well, in substance, didn't Mr. Fred Montgomery say "What do you mean? We took you from only \$20,000 in '42 and now you have sales of \$265,000 to \$270,000, what do you mean, our representation wasn't satisfactory?" Was something like that said?

A. There could have been something like that

(Testimony of John M. Storkerson.)

in effect. I don't remember exactly what he did say.

Q. In other words, tell me now your best recollection of what he did say about it, either Fred or Ray.

A. That was a very—he spent some time pointing out the build up in business by the Montgomery Brothers. I tried to point out some of the story, that basically an awful lot of that credit was due to the war; it was due to the work being done by others which he was giving no credit to, by our own engineers. We had other representatives in other areas who had aircraft accounts; that we appreciated the increase in business. [105] And it was that nature of conversation I think went on for some time. That was the essence of it. And I ultimately told him that I hadn't come there to argue that point anyhow; I had come there to try to work out a termination agreement with them.

Q. With reference to the next sentence, "Our requests and suggestions for improvements have been almost entirely disregarded by you, and we have been reluctantly forced to the conclusion that the termination of our relationship is essential." Was the thought conveyed in that sentence discussed by you at that time with them or either one of them?

A. I don't remember, because I don't remember their ever quoting parts of that letter. They—as I recall, they took a general attitude on the entire

(Testimony of John M. Storkerson.)

letter; I don't think they picked out any particular segment, as I recall.

Q. You had read the letter before presenting it?

A. I was aware of what was in it.

Q. Did they ask you to tell them a single instance that you yourself knew where they had been accused of disregarding suggestions and requests that day? Was that discussed?

A. If it was, I don't remember; possibly it was.

Q. What is your best recollection of what was said about that?

A. I'm sorry; I don't remember.

Q. Now tell me, please, what was said about this so-called arrangement to straighten this thing out. As I understand it, there were two suggestions maintained by both sides: One, you [106] stated, I believe, that you said you came there for the sole purpose of discussing an adjustment of their profits to be made during the termination period, and they, on the other hand stated "No, we wanted to discuss a double affair here; we want to talk about discounts—I mean profits in this period of time; we want to talk about the right to maintain a part of this territory." Now, will you tell me just exactly what was said about that between you people, as you now understand, on that day?

A. When I came there, it is my best recollection that I told them that I was there for the purpose of arranging a termination. I further told them that I was also there to work out arrangements on orders with the aircraft companies and so forth, and as-

(Testimony of John M. Storkerson.)

signments. I did not tell them that I was there for the purpose of entering into a contract with them or making any future arrangements on the northern territory.

Q. Well, at that particular time didn't you tell them that you had no power to enter into any contract; that you would have to bring back to your principals whatever was said there for their final approval?

A. Much later in the discussion.

Q. During the discussion you did say that whatever you were talking about there, you weren't empowered to make a definite commitment; it had to be taken by you back to your principals for their approval, in substance?

A. To the best of my recollection. [107]

Q. What did Montgomery Brothers ask you as a concession? What did they want in order to straighten this thing out?

A. In substance, as I understood it, they were prepared to work out a definite termination agreement with me on the basis of the terms that were outlined by Mr. Fred Montgomery, as I recall; and I said that I would be willing to consider negotiating a sales agreement for the north. That is all.

Q. At any time in that conversation did either of the Montgomery Brothers tell you that they would settle or adjust the profit situation on a percentage or fractions period unless there was tied to that some other agreement by virtue of which

(Testimony of John M. Storkerson.)

they would remain your representative in other parts of the territory excepting Los Angeles?

A. I clearly had told them that those two transactions were complete and distinct and one had no bearing on the other; that the first thing that was to be done was the contract termination settlement. And it was in answer to that they asked me if I would be agreeable to certain terms on the cancellation. Nothing at that moment was said——

Q. Right on that exactly, “Nothing at that moment was settled”?

A. Said.

Q. Said. All right; about what?

A. About the contract in the north.

Q. You say when you left San Francisco to go to Los Angeles there was a definite agreement which you claim that he did not [108] regard or disregard it in Los Angeles. Tell me, what was the agreement when you left San Francisco?

A. The agreement was before I left on the second night—I believe I called our plant on two occasions, one upon the evening of the first night, in which I outlined the potential terms of termination. I called them on the second night to concur, as I recall, in my actions.

As I clearly understood it, I left San Francisco with a termination agreement, and that I had only and separately said that I would agree to negotiate a new contract.

Q. Did you understand when you left San Francisco that the Montgomery Brothers had said,

(Testimony of John M. Storkerson.)

“Sure, we are going to waive our profits for a certain period and will not require——

A. As consideration——

Q. ——as part of that agreement that we get some of the territory? A. No.

Q. Is that your understanding?

A. May I have that question again?

Q. Was that your understanding when you left San Francisco that either of the Montgomery Brothers had said, “Surely, we will take part of those profits during the six months period,” or did they say “We will adjust our profits provided that we get some of the territory”?

A. They did not at San Francisco state to me that they would [109] require—that they would have to have a contract in addition to the other.

Q. What was said about the retaining of any of the other territory at that conference? What was said about that?

A. What was said about it was the fact that in our discussion I had outlined originally to them certain terms, and they came back to me with certain terms. We discussed the probability that they could have everything they wanted with the exception of a very few thousand dollars on the total.

Q. You made some terms; they came back with some terms?

A. Right; which I said were agreeable.

Q. That was about profits, you say, only?

A. About the termination, and it also involved transfer of orders in the southern territory.

(Testimony of John M. Storkerson.)

Q. Now when the contract was prepared to send here—I mean the exhibit—in February, 1949, Exhibit No. 10, which I show you, it, as a matter of fact, did provide for the territory which they were to retain. (Handing paper to witness.) Did you read it? Is that right? Look at the contract. Doesn't it provide that they have all the territory excepting Southern California?

A. Are you referring to a letter of February 4th?

Q. I am referring to the contract.

A. Of February 9th?

Q. Exhibit 10. Read the contract, the first part, territory covered. [110]

A. Territory covered?

Q. Yes.

Mr. Doyle: You mean the proposed contract in that letter?

Mr. Christin: It says "Agreement."

A. This proposal says that "Exclusive franchise of territory as follows: The State of California lying north of the Counties of San Luis Obispo, Kern and San Bernardino, and the States of Washington, Oregon, Idaho, Western Montana, Nevada, Utah and the Territory of Alaska."

Q. Now, as you read that, they had the representation under that proposed agreement of Washington, which includes Seattle, I take it, or Boeing?

A. It would interpret that way.

Q. As I take it, the only thing excluded from that contract is south of the so-called Tehachapi?

(Testimony of John M. Storkerson.)

A. That I wouldn't know.

Q. You wouldn't know about the Tehachapi?

A. I don't know California geography.

Q. It states "The State of California lying north of the Counties of San Luis Obispo, Kern and San Bernardino." You don't know where they are?

A. I have an idea.

Q. However, reading this agreement, it means to you that under this proposed agreement—this was in February after the other conversations, it excluded all that territory south of San Luis Obispo, Kern and San Bernardino; for your information I will [111] tell you that Los Angeles is south of that line.

A. Yes.

Q. You were in favor of accepting that when that contract was prepared?

A. Yes.

Q. In that conversation what was said by you with reference to carrying on sales activities after January 24th?

A. I said that we intended to set up our own office in Los Angeles.

Q. When? When did you contemplate setting up that office?

A. When?

Q. Yes.

A. At the close of termination of the Montgomery Brothers.

Q. My question was, what activities were anticipated or were discussed so far as selling was concerned during this termination period? What was everybody going to do?

(Testimony of John M. Storkerson.)

A. Well, I proposed that we would set up an office; we intended to have a——

Q. No, that is after March 1st. I mean January and February, 1945, what was going to be done about carrying on business?

A. In January and February?

Q. Yes.

A. We presumed that Montgomery Brothers would carry it on during the termination period.

Q. What were they supposed to do, carry on the business? [112] A. That's right.

Q. And carry on the same as they had carried on prior to the termination date?

A. Not necessarily. That is what I was there to negotiate.

Q. They were supposed to place orders, weren't they? A. Yes.

Q. They had to carry on activities in Los Angeles and Boeing, to service and contact the airplane trade, didn't they?

A. During the 60-day period, yes.

Q. I now understand you to say that you were going to go out and make sales on your own behalf with your new organization in the months of January and February? A. No, sir.

Q. And what was said about pressing orders, to get all you could in? Wasn't that said by somebody, in those months?

A. Pressing orders and getting all you could in?

Q. In other words, what I am getting at, Mr. Storkerson, during these months of January and

(Testimony of John M. Storkerson.)

February there wasn't going to be a sit-down strike; nobody was going to sit down and do nothing; is that correct?

A. That is right.

Q. What was supposed to be done, as you understood, by Montgomery Brothers during January and February?

A. They were to continue their normal pursuit of orders.

Q. And what do you mean by that? To do [113] what?

A. To solicit orders.

Q. And at that time you had told them that Hawkins was going to work for you?

A. What time?

Q. During this conversation on January 24th?

A. In San Francisco?

Q. Yes.

A. I did not tell them that Hawkins was going to work for me.

Q. When did Hawkins go to work for you?

A. He went to work for us on March 1, as I recall.

Q. All right. With reference to the conducting of the business after January 4th and before March 1, 1949, what if anything was said about contacting the airplane companies in Los Angeles?

A. I'm sorry; I didn't hear the first part.

Q. What was to be done with reference to contacting the airplane companies?

A. In Los Angeles?

Q. Aircraft companies—yes.

(Testimony of John M. Storkerson.)

A. Mr. Ray Montgomery was to meet me in Los Angeles.

Q. What was said about the reason for Ray Montgomery going to Los Angeles at that conference? Why was Ray going down?

A. He was going with me to the various aircraft companies to announce the change of Montgomery Brothers to Fenwal as of March 1.

Q. In fact, didn't you say that you would like to go to the [114] airplane companies, and regardless of your difficulties and argument about Hawkins, you would bury the hatchet and go out with him and you would go together and in substance not let the airplane companies know of any misunderstanding between Fenwal and Montgomery Brothers? Didn't you have that understanding?

A. My understanding was strictly that Ray Montgomery and I were going down to the various aircraft companies.

Q. For what purpose?

A. For the purpose of announcing the change-over to Fenwal.

Q. For the purpose of carrying on sales that they were going to try to make between January 24 and March 1, and for any sales you would make after March 1st; that was the purpose of going down there?

A. The purpose was to make the arrangement clear to the aircraft companies as to how we would operate.

Q. Wasn't it stated there that you would put on

(Testimony of John M. Storkerson.)

a smiling face when you went there and not tell the aircraft companies the reason for this switch?

A. Not tell them the reason?

Q. The reasons for it?

A. I don't remember any such.

Q. Was it then stated that Hawkins was going to be with you to make this contact?

A. At San Francisco or Los Angeles?

Q. Yes. [115]

A. I don't recall what was said about it at San Francisco, but we certainly arranged it in Los Angeles.

Q. Now then, we have got down to Los Angeles about the 26th or 27th of January, is that right?

A. Correct.

Q. And you went to the office of Montgomery Brothers, is that right?

A. I would like to look at that date, if I may. I arrived there in Los Angeles; I met Mr. Montgomery the morning of the 27th.

Q. At his office?

A. No, I can't say; I don't recall that. I think Mr. Hawkins—no, I think I actually met Mr. Montgomery—I can't say whether we met prior to or at his office.

Q. You did meet with Mr. Hawkins and Mr. Montgomery in Los Angeles?

A. At Mr. Montgomery's hotel.

Q. Did you know Mr. Hawkins prior to that time?

A. Yes.

(Testimony of John M. Storkerson.)

Q. When had you last seen Mr. Hawkins immediately prior to that conversation on the 26th or 27th? A. The night of the 26th.

Q. You saw Mr. Hawkins before you and Hawkins and Montgomery met in the morning?

A. I did. [116]

Q. Where did you see Mr. Hawkins?

A. I arranged—as a matter of fact, when I was in San Francisco I had told Mr. Montgomery that I was going to Los Angeles and I was going to see Mr. Hawkins; that I was going to make a proposal to him. Therefore, when I went down I made the arrangement to meet him on that evening.

Q. What do you mean by a proposal to him?

Mr. Doyle: If the Court please——

Mr. Christin: I mean to say the proposal——

Mr. Doyle: Just a minute, please, Mr. Christin. The proposal to Hawkins enters upon the question of the employment of Hawkins. He is referring now to the night of January 26th. That is beyond the scope of the direct examination of this witness and it bears upon the allegations of the cross-complaint. I submit that it is not proper cross-examination and that it is not a part of the Plaintiff's case in chief.

Mr. Christin: My question is not directed to that.

The Court: The objection is overruled.

Mr. Christin: Read the question please.

(The reporter read the question.)

(Testimony of John M. Storkerson.)

A. I was going down to talk over with him the possibilities of his coming with our company, to stipulate as to matters that he was interested in, salary, conditions of employment, and so forth and so on.

Q. (By Mr. Christin): Well then, after having seen Hawkins on [117] the evening of the 26th, now we come to the meeting between Hawkins, Ray Montgomery and yourself at their office in Los Angeles, is that right?

A. The morning of the 27th.

Q. Tell us exactly who was there. Anybody else but those three, you, Hawkins and Ray?

A. At his office, there would be people around his office there.

Q. But nobody else participating in the conversation?

A. I don't remember whether they came into it or not.

Q. What was said that morning?

A. Well, there was considerable discussed, because it took a good deal of time for Ray to go out to the aircraft companies. We talked about where to go and which ones to go to first and what the plans would be for the first day.

Q. Had Hawkins arranged that itinerary before you met him, so far as you know, on the morning of the 27th?

A. For that trip that day?

Q. That trip?

A. Not that I know of.

Q. All right. In that discussion did Mr. Ray Montgomery again manifest what I will say, as you understood it at the time, anger in the presence of

(Testimony of John M. Storkerson.)

Hawkins that you had taken Hawkins away from him?

A. I have no recollection of any anger being displayed at Los [118] Angeles.

Q. Was anger displayed in San Francisco as you now recall it? A. Yes.

Q. By Ray. In Los Angeles do you remember his making statements about Hawkins to you and asking Hawkins in your presence, "What do you think you are doing here after all these years letting us down"? Was that said in your presence to Hawkins? A. I don't remember.

Q. No recollection of that at all?

A. I don't recollect.

Q. You say Mr. Ray Montgomery appeared to be angry to you in the San Francisco conversation. Refreshing your memory, wasn't he angry when he first saw Hawkins that morning with you?

A. I don't know that I remember much about it. As far as I recall, we drove together from the hotel down to Mr. Montgomery's office. I think conversations were purely general, as I recollect them.

Q. At that conversation the first morning in Los Angeles, was any reference made about the dividing of the profits between Montgomery and Fenwal for the months of January and February?

A. That morning?

Q. That morning.

A. I am quite sure on that morning I would have informed Mr. Ray Montgomery that I was having

(Testimony of John M. Storkerson.)

Dr. Walter arrange to write a letter of agreement which we were going to ask him to sign [119] in connection with a division of profits.

Q. I mean, were the details of how it was going to be split up discussed on that morning?

A. I don't recall the details of that particular morning, because it is so strong in my memory, is the discussion which took place later on.

Q. That was discussed later in the week down there?

A. Certainly, it was discussed Sunday morning.

Q. You don't recall it that morning?

A. No, I do not.

Q. The three of you went out to the airplane companies? A. That's right.

Q. Tell me first—or I don't care in which order you take it, the first session at any one of the airplane companies.

A. Frankly, I don't remember.

Q. Well, do you remember the conversation at any one of them without naming them by name?

A. As I remember it, the conversation was fairly much the same in most places. In some places it was very short; some places it was slightly extended.

Q. What was it as you recall?

A. During which Ray would tell the aircraft company of the change to our office on March 1; that we would go along normally until the first of the month, and he hoped to carry on in the north. I think he said something about that. [120]

(Testimony of John M. Storkerson.)

Q. Who said that?

A. Mr. Ray Montgomery.

Q. He hoped to carry on in the north?

A. Yes.

Q. In the presence of the airplane people?

A. That's right. As I recall, he told the aircraft people we were in agreement on the transfer in Los Angeles.

Q. Did he then say, as you understood it, that they would be dealing with Fenwal in Los Angeles but the other companies or allied companies would be dealing with them in the other parts of the Pacific Coast?

A. He said he expected it would work out that way.

Q. So at that time you knew that he expected that out of this deal——

A. When you say "expected" I am not sure.

Q. You heard him say it?

A. I heard him say it, yes.

Q. Did you make any comment when he said it?

A. Not to the aircraft companies, no.

Q. Hawkins was there on that trip?

A. He was with us, yes.

Q. Did Mr. Montgomery or did you tell the aircraft executives you were speaking to at the time, or the production men, that Mr. Hawkins was going to be the new man and they would deal with him in the future? [121]

A. He said that Mr. Hawkins would be taking over March 1st, I believe is the way he put it.

(Testimony of John M. Storkerson.)

Q. In what capacity?

A. I don't remember in what capacity it would be; he would be handling our Los Angeles office.

Q. Didn't Mr. Ray Montgomery in substance say Mr. Hawkins would be manager of Fenwal and all future orders after March 1st would be placed with him or that organization, and all orders prior to that date would be placed with the Los Angeles office of Montgomery Brothers?

A. There is so much in that question——

Mr. Doyle: I have no objection to the question if the witness understands it.

Mr. Christin: I will reframe it.

Q. Didn't Mr. Ray Montgomery, in substance, say that Mr. Hawkins, who had been associated with them would be the new manager or the manager for Fenwal in Los Angeles after March the first and that orders thereafter would be placed by Mr. Hawkins for Fenwal—with Mr. Hawkins for Fenwal in Los Angeles? Did he say that?

A. Words to that effect, as I remember.

Q. And did he say that all orders prior to March first would be placed with the Montgomery Brothers organization in Los Angeles?

A. As I recall, that is correct. [122]

Q. And did you make any comment one way or the other on that?

A. I don't recall commenting directly on what Mr. Montgomery had to offer.

Q. Did you just stand by and say nothing, or did you make some appropriate remarks?

(Testimony of John M. Storkerson.)

A. Comments to the effect that we would do our best to be of service to them, and I told them a little bit what our plans in connection with that office were, and that usually dispensed with the matter.

Q. To revert back for a moment to the conversation in Los Angeles between Ray and Hawkins and you in the office, do you recall that Mr. Ray Montgomery rehearsed to Mr. Hawkins in your presence in substance what had happened in San Francisco on the 24th and 25th? Did he rehearse to Hawkins the substance of what happened in San Francisco? A. He may have; I don't know.

Q. Is it still your testimony you don't recall that Mr. Ray Montgomery at that time stated about the argument and how angry he was at you in San Francisco when he was told that you were going to take over Hawkins? Was that alluded to at all in the Los Angeles conversation?

A. It may have been; I don't recall it.

Mr. Christin: I am going to another topic of the direct examination, Your Honor.

The Court: I was late, so you may take it up now. You may [123] proceed.

Q. (By Mr. Christin): After you went on the tour of the aircraft manufacturers, did you then have other conversations with Ray Montgomery in Los Angeles? A. I did.

Q. I don't care what order you put them in; tell us in substance what was said and who was present at each conversation.

(Testimony of John M. Storkerson.)

A. I saw him on Sunday morning at the close of that week.

Q. Was that the day after you made the last trip to the last aircraft plant?

A. I couldn't tell you that exactly. I remember the one time he told me he wanted to see me at the hotel, I think Saturday afternoon, so I wasn't with him and I met him the following morning.

Q. I take during these trips to the aircraft manufacturers you didn't discuss any of the contractual situations; is that correct?

A. I don't know.

Q. Let us get to the conference in the hotel on Sunday. Tell us who was there.

A. At that conference, Mr. Ray Montgomery, Mr. Hawkins and myself.

Q. And how long did it last?

A. Well, I don't know; I imagine from breakfast until later on in the morning; it may have been several hours; I don't know. [124]

Q. Was Hawkins there during that conversation?

A. As I recall.

Q. Tell us in substance what was said by both you and Ray regarding Hawkins.

A. Ray told me that he—as I recall, he told me something to the effect that he had been in discussion with San Francisco and he wanted to talk to me some more about this termination agreement and the proposed contract for the north; something to the effect he wanted to see those two things settled. He tried to link them together at that point and

(Testimony of John M. Storkerson.)

make one completely contingent on the other. He made the comment, something to the effect that they would be very foolish if they didn't see a new contract and have it in their hands before they let the other agreement made in San Francisco go through, and I charged at that time that that was not fair, it was not in order, in line with what we had done in San Francisco, what we had agreed to, and he denied that there was ever any agreement in San Francisco.

Q. As a matter of fact, as I understand from your testimony, you weren't empowered to make any agreement in San Francisco, were you? You were just getting data to send back to your principals for approval or disapproval?

A. I was in constant—that's right.

Q. Have you told us all you think happened in that conference of two hours? [125]

A. No; he proceeded to add a number of concessions he wished me to make. I thought—I reacted—I'm sorry; he had a number of proposals, changes in it, which I said I would be glad to consider.

Q. Tell us what they were in passing.

A. I think one had to do with the discount arrangement under a proposed contract which he would be interested in. Another had to do with Boeing Aircraft, I think, as I recall. In general, it was going back more in the direction of the previous agreement we had had with him, which I told

(Testimony of John M. Storkerson.)

him under no circumstances in the beginning that we would ever repeat.

Q. I didn't hear the last part.

A. In substance it was going to be more in the direction of the old agreement which we had cancelled, and I recall that I said that they would have the agreement as I had transmitted it as carefully as I could to Dr. Walter—it would be in their hands in a few days, and that I asked him—I said I would appreciate it if they would agree to it and carry through on it, and I on my part was going back in good faith to look into the negotiation of a new contract.

Q. Was anything said there with reference to the method of billing—by that, I mean to refresh your memory didn't Montgomery Brothers tell you in their experience of 30 years they weren't the regular representative of an eastern manufacturer; their way of doing business was that they always bought [126] the material, bought it by exclusive contract representation, and then they in turn would bill to the consumer, differing from the custom of the representative who placed the order and in many instances the eastern manufacturer does the billing? Wasn't there some disagreement about that phase of the new contract?

A. As to that point, I don't remember what Mr. Montgomery on any occasion told me—on that occasion told me, but I recall that I told them that we weren't going to have a buy and resale agree-

(Testimony of John M. Storkerson.)

ment which would be anything like the one that we had previously held and cancelled.

Q. Prior to your making that statement, hadn't Mr. Montgomery, in order to bring up that matter of conversation, stated to you that that would be a "must" in a new contract; in other words, that they would be purchasing and reselling and not dealing on a commission and you billing? Wasn't that what brought up the whole thing, Montgomery saying that?

A. I don't recall that he ever told me that it was a must.

Q. You said that you wouldn't stand for the old procedure—you started the conversation along that line, or did he? A. On the old procedure?

Q. Yes. A. I don't recall.

Q. Somebody did say that the new contract would either be a contract for buying and selling or would have the regular representation [127] with the manufacturer doing the billing; that was discussed, wasn't it? A. It probably was.

Q. What is your best recollection?

A. As I recall, it was discussed.

Q. Was anything said there about cutting down the time for termination from 60 days as it was in the old contract to 30 days in the new contract? Did they say anything about that?

A. Yes, I recall.

Q. What was said?

A. Nothing was said specifically about dating; in fact, if I may change my answer, I don't recall

(Testimony of John M. Storkerson.)

that that particular thing was brought up. I had comments to make relative to termination, but I don't think any specific term was discussed.

Q. I show you again Exhibit No. 10, draft or form of contract that was sent out on November 9th, and ask you——

Mr. Doyle: November 9th?

Mr. Christin: I beg your pardon; February 9, 1949, with a letter, and ask you to read Article 9, and tell me what is the termination period, 60 or 30 days. A. 30 days.

Q. And the original contract of 1944 as modified in 1936 had 60 days? A. Right.

Q. And your recollection is that was not discussed by you in [128] Los Angeles with Ray Montgomery as to whether it would be 60 or 30?

A. As I recollect, I mentioned the termination was different in our standard contracts which we entered into with other representatives.

Q. When you stated the standard contract, did you tell them that your standard contract was 30 days and not 60 days?

A. As I recall, I told them that it was a more—— if I can find the——

Q. Shorter time?

A. I didn't make it in terms of time, but my comment would imply it would be a shorter term.

Q. If you say you implied, what words did you use by virtue of which you think you made that implication?

(Testimony of John M. Storkerson.)

A. I don't remember, except I was aware that he would not be as happy with our discount terms.

Q. When you prepared the second contract you knew he wouldn't be happy when he would get it, isn't that right?

A. I saw no reason why he shouldn't be content with it.

Q. You just said he wouldn't be happy.

A. I said I didn't think he wouldn't be as happy with those particular terms.

Q. Have you told us in substance all that occurred in that room for two hours on that afternoon, as you recall it?

Mr. Doyle: Morning, Mr. Christin—Sunday morning. [129]

Mr. Christin: I thought it was afternoon.

Mr. Doyle: Sunday morning.

Mr. Christin: On that morning or afternoon.

A. It was Sunday morning. As I recall at the moment, yes.

Q. Now then, you went on East, is that correct?

A. Yes.

Q. And the letter of February 4th—

The Court: The Clerk tells me we will have to finish up with the case on the blackboard tomorrow. I would like to serve counsel's convenience. I think we can probably get through in the morning, so we can take it up in the afternoon, or if it is more convenient I can hear you again day after tomorrow morning.

Mr. Christin: Any time.

(Testimony of John M. Storkerson.)

The Court: What would suit you better?

Mr. Doyle: I will suit the Court's convenience, if the Court please. I only have the observation that I have these people here from Boston. I would for that reason like to accommodate them.

Mr. Christin: I desire to ask the Court's indulgence; I have to be in the Appellate Court for about ten minutes; I can't get out of it, on the morning of Thursday, the 13th.

The Court: That will be day after tomorrow.

Mr. Christin: Would it be all right if I came here about 20 minutes after 10:00? [130]

The Court: We will resume then at 2:00 o'clock tomorrow afternoon.

(Whereupon an adjournment was taken until Wednesday, July 12, 1950, at 2:00 o'clock p.m.) [131]

Wednesday, July 12, 1950—2:00 o’Clock P.M.

The Clerk: Fenwal Incorporated versus Montgomery Brothers, on trial.

Mr. Christin: Ready.

JOHN M. STORKERSON

called as a witness by the plaintiff; previously sworn.

Cross-Examination
(Continued)

Mr. Doyle: May it please the Court, I should state for the record that Mr. Christin has produced the original letters of June 13, 1947, and September 17, 1947, copies of which are now in evidence as Exhibits 16 and 19, respectively, and it is stipulated between counsel that the copies may be used instead of the originals so that we do not need to re-mark them.

Mr. Christin: Thank you.

Q. Mr. Storkerson, you were saying yesterday, I believe, that you went out with Mr. Ray Montgomery and Mr. Hawkins in the month of March to see the aircraft manufacturers; is that correct?

A. That’s right.

Q. And you saw the production executives at that time?

A. The people that I saw were the ones that were selected as being proper by Mr. Montgomery, and I don’t recall what their official capacities were.

Q. On that occasion did you have occasion to refer to Mr. Hawkins, as to why he was there? [132]

A. During the——

(Testimony of John M. Storkerson.)

Q. Any one of these conferences? You said they were all about the same?

A. Yes; during either—that being the March conferences, I had either told Mr. Montgomery or gave him reason to know previously that we had hired Mr. Hawkins.

Q. And had you so advised the executives of these companies you were speaking to on the prior visits you had made with Montgomery and Hawkins in around January 26, 27 and 28?

A. I recall Mr. Montgomery advised the various people to whom we talked that Mr. Hawkins would be with our organization after the first of March.

Q. Do you recall one conversation, I believe it was with Mr. McChesney—what company was that, Douglas or Lockheed?

A. I believe it was Lockheed.

Q. And the conversation that you had with him in the presence of Mr. Montgomery and Mr. Hawkins, do you remember Mr. McChesney saying anything with reference to what Mr. Montgomery thought about you having taken Mr. Hawkins from them in that conversation?

A. As I recall, Mr. McChesney had reference to the change—general change in our operations from the Montgomery Brothers Company to our company. I do not remember that it was specifically directed with reference to Mr. Hawkins or that there was any reference made specifically to Mr. Hawkins. [133]

Q. In substance, refreshing your memory, didn't

(Testimony of John M. Storkerson.)

McChesney say to Ray Montgomery, "Tell me, what do you think about this taking your key man? Is that agreeable to you?" And Mr. Montgomery said, "Well, what can I do about it?" in substance?

A. I don't recall that being said.

Q. Nothing of that kind ever happened to your memory as of this time?

A. You asked me—not of that kind, as I recall; there was a reference made to the general change, but not directly to Mr. Hawkins.

Q. What was said about the general change along those lines?

A. I believe that Mr. Montgomery was asked whether he was happy with the change, and he, as I recall, replied that he wasn't happy, but he was agreeable to it.

Q. Did he state why he wasn't happy at that time and place to Mr. McChesney?

A. He did not, to the best of my recollection.

Q. Now, after you left him that trip—oh, by the way, you had arrived in Los Angeles in March, early March. Did Mr. Ray Montgomery, so far as you know, know that you were coming? Had you told him you would be there in March?

A. I hadn't told Mr. Montgomery I was coming in March.

Q. Did you before speaking to Mr. Montgomery in March and after your arrival in Los Angeles tell Mr. Ray Montgomery that you were going to go and contact the airplane people yourself [134] alone?

(Testimony of John M. Storkerson.)

A. Before talking with him did I tell him?

Q. Yes.

A. I don't understand your question.

Q. In other words, you went to see the aircraft executives before you spoke to Montgomery in Los Angeles in March; is that correct?

A. You mean the Purchasing Agents?

Q. We will call them Purchasing Agents, yes.

A. I went directly to see the people at Lockheed; I hadn't discussed it with Mr. Montgomery on that occasion.

Q. When you got to Lockheed—was that the first one you went to see? A. That is correct.

Q. Whom did you see in Lockheed?

A. I saw several people, among them, as I recall, there was a Mr. Brown—Mr. Neal Brown, of their credit group. There were others I saw; I believe it was Mr. McChesney.

Q. And was Mr. Hawkins with you?

A. I don't remember.

Q. Well, now, that is before Mr. Montgomery arrived at that conference, is that correct?

A. Correct.

Q. Now state to the Court what was said to the people there at that time when Montgomery wasn't there. [135]

A. I advised them I had come for their advice. I explained briefly that the situation was that we had been advised by Montgomery Brothers that they preferred not to pay their bill; that we were

(Testimony of John M. Storkerson.)

faced with a problem of producing materials which we knew that they required in their plant for production schedules, and that we were definitely on the spot because we knew of no way that we could proceed to ship those bills and be paid for them, and that would have made it impossible for us to carry on our business.

Q. Did you at that time ask them to deal directly with you and just by-pass Montgomery Brothers?

A. I did not.

Q. Well, what did you say to them about who was going to place the orders after March 1st at the time of this conference?

A. As far as my discussions with the people at Lockheed were concerned, I merely was there to ask them for their advice.

Q. What advice did you solicit at that time?

A. What we should do.

Q. What did you ask them to advise you, or what problem—

A. The problem was what we should do to make it possible to release shipments to their company.

Q. What did they say?

A. They said that they would—as I recall, it was Mr. McChesney said that he would—that they couldn't have that kind of a situation, and I believe he was going to get in touch [136] with Montgomery, and I don't remember exactly what he said.

Q. You at that time knew that all orders which were to be filled which had been lodged in January and February with Montgomery Brothers, that the

(Testimony of John M. Storkerson.)

contract was between Montgomery Brothers and Lockheed? A. I was aware of that fact.

Q. And so far as you were concerned, you were not a party to that transaction; by that I mean the sale was from Montgomery Brothers to Lockheed, not from Fenwal to Lockheed?

A. The orders were placed between Montgomery Brothers and Lockheed.

Q. That is right. Did you at that time say that you wanted them to not observe that contract with Montgomery Brothers, but to deal directly with you? A. I did not.

Q. Well, did Mr. McChesney in substance say, "I will call Ray Montgomery right away"?

A. I don't remember his exact words.

Q. What did he say?

A. As I recall, he was going to look into it and we would come back to see him on the following day.

Q. Did you wait right there at Lockheed and McChesney left the room and telephoned Montgomery and Montgomery came right out that very day at that very time?

A. That is not true. [137]

Q. You don't remember that?

A. I believe I talked with Mr. McChesney first on Monday. I saw Montgomery on Tuesday, the 8th.

Q. Was that by a prearrangement between you and Montgomery? A. It was not.

Q. You say that Montgomery Brothers refused to pay the February statement which was for the January business, is that correct?

(Testimony of John M. Storkerson.)

A. I advised them as accurately as I could at that time what the situation was. I don't remember exactly what I said. You must remember these conversations took place some years ago—a year and a half, and it is exceedingly difficult to remember the details of your conversations.

Q. When for the first time did you demand that Montgomery Brothers pay the statement for the January deliveries?

A. The first time was when the—the first demand we made was in the series of telegrams which have been put in evidence.

Q. Am I correct in saying then that the first demand was the telegram of February 21st, Exhibit 13 of the Plaintiff?

A. Might I have them all?

Q. You may have them all. Just a moment. I believe they are all here, Mr. Storkerson. (Handing documents to witness.)

A. I believe that the first time that we demanded payment was by this telegram in which—which is dated February 24th, and states that “Unless February 10th payment made by wire to us [138] by February 25th, we must stop shipments.” These wires have nothing to do with it.

Q. I think you are in error, aren't you? Isn't it February 21st when you said, “January payment not received; please wire”—that was February 21st, not the 24th?

A. That isn't the wire that I handed you, Mr. Christin.

(Testimony of John M. Storkerson.)

Q. You claim the first demand you made for the payment was the wire of the 24th?

A. The one I just pointed out.

Q. Now then thereafter and on the 24th you received the wire from them, Exhibit No. 23, is that correct, which states "Contract with you does not provide for payment February 10. If you interfere with contracts with our customers and/or fail to carry out your obligations, including deliveries, we will hold you liable for all damages."

A. Mr. Christin, I would have to see all the wires again in their proper order.

Q. All right, sir. (Handing papers to witness.)

The Court: Have you a question pending, Mr. Christin?

Mr. Christin: Yes, what wire did you receive according to those wires in reply to your wire of the 24th?

A. I'm still trying to get this in order. There are other wires in here that were not supposed to be. It is a question of getting the datings correct. All right. I don't have that wire here. [139]

Q. Just a minute; that is all the wires I find there.

A. I believe I just quoted from it a few minutes ago.

Q. I beg your pardon?

A. I believe I just quoted from it a few moments ago.

Q. Here is another one the Clerk found.

A. Wait a minute; maybe this is the wire.

(Testimony of John M. Storkerson.)

Q. This is March 5th; that is a later one.
(Handing document to witness.)

A. Now if you will please ask the questions, I think I am ready.

Q. What wire did you get in reply from Montgomery Brothers to the one you just read where you say for the first time you demanded payment of the February 10th invoice?

A. I believe it is this wire.

Q. You now hand me Plaintiff's Exhibit 23; that is the one I just read a moment ago: "Contract with you does not provide for payment February 10. If you interfere with contracts with our customers and/or fail to carry out your obligations, including deliveries, we will hold you liable for all damages." Is that the one?

A. Mr. Christin, I told you I'm a little bit confused on this. I want to be sure I have all the wires and straighten them out.

Q. Take your time. I think there are two of the 24th. That confused you, I think.

A. All right; I believe I will stand on the fact that this [140] wire is the one.

Q. The one you just handed me? A. Yes.

Q. You at that time knew, did you not, that Montgomery Brothers had made the commitment to sell to and deliver to the aircraft manufacturers the commitments included in the orders which had been lodged with you? You knew that?

A. We knew that we had orders of Montgomery Brothers; what their relationships were with the

(Testimony of John M. Storkerson.)

aircraft companies was not direct knowledge of ours.

Q. At that time you had lodged with you contracts which had been obtained in the month of January and February up to the 24th?

A. Montgomery orders which were placed with us.

Q. So you knew of their commitments with the manufacturers of airplanes? A. I——

Q. And you knew that the airplane companies needed these particular thermostatic switches?

A. We understood it.

Q. And you realized of course if Montgomery Brothers did not deliver and fulfill, they would be liable in damages, you knew that?

Mr. Doyle: That is a matter of conclusion of the witness upon a proposition of law, and I submit it isn't proper [141] interrogation for that reason.

The Court: He may answer if he knows. He asked him about the damages.

A. I don't believe that I had considered that at the time.

Q. (By Mr. Christin): When you received our wire of the 24th, when the wire stated: "If you interfere with our customers and/or fail to carry out your obligations, including deliveries, we will hold you liable for all damages." Did that mean anything to you at all?

A. Yes, I understood it.

Q. What did it mean to you?

(Testimony of John M. Storkerson.)

A. I didn't go specifically into what was the intent behind those words, but the words speak for themselves, I think.

Q. You did at that time understand it to mean that if you didn't deliver to Montgomery you would be liable in damages and——

A. We didn't——

Q. If Montgomery Brothers didn't deliver to the manufacturers we were liable in damages, and by the same token, if you didn't deliver to Montgomery Brothers you would be liable in damages? Didn't you understand that?

A. The matter of my principal concern at the moment was the fact that we couldn't continue to do business unless we had the money to do business with.

Q. All right. That was the 24th of February, wasn't it?

A. What was the 24th of February? [142]

Q. The time that you couldn't continue to do business? A. That's right.

Q. That was only four days to the 28th of February when the contract was entirely terminated; is that correct? A. Correct.

Q. And that embarrassment for those four days made it impossible for you to continue to manufacture; is that correct?

A. I don't—it made it impossible for us to manufacture?

Q. Yes, or to carry out the commitments of the contract that Montgomery Brothers had?

(Testimony of John M. Storkerson.)

A. The point is, Mr. Christin, we didn't use your date of the 28th; the point was we couldn't continue to ship unless we knew exactly when the funds were coming in.

Q. You said you were embarrassed; weren't able to carry out the provisions——

Mr. Doyle: No, that wasn't the testimony.

Mr. Christin: I am asking him; he can say yes or no.

Mr. Doyle: Have the Reporter read the testimony then.

Q. (By Mr. Christin): Didn't you say that in substance yesterday?

A. Please repeat the question.

Q. Didn't you in substance say by reason of the fact that the money wasn't coming in from Montgomery Brothers it made it impossible for you to carry on your manufacturing?

A. It is difficult for me to remember exactly the words I [143] used, but I think it is obvious we couldn't continue in business indefinitely without assurances we were going to receive funds with which to do business.

Q. In the past there was a time when you owed Montgomery Brothers \$22,000 for a period of time?

A. I don't know the figure; I would have to consult the record.

Q. I show you what appears to be a copy of a letter——

Mr. Doyle: It is in evidence. Why don't you show him the original, Mr. Christin?

(Testimony of John M. Storkerson.)

Mr. Christin: Very well. May 20th.

Q. I call your attention to a letter of May 20th, Exhibit No. 15, and reading therefrom the fourth paragraph:

“From the copies of your statements, which we are attaching, covering our payment of \$19,190.24, from which we took one per cent cash discount that you are objecting to, if you will refer to these statements you will see that on December 31st you owed us \$22,687.79, in January you owed us \$16,183.98, and in February you owed us \$13,371.62.” Were those statements in that letter true?

A. I wouldn't—this is Montgomery Brothers' letter. I wouldn't know without consulting our records.

Q. I see. Have you a reply to this letter of May 20th of Montgomery Brothers? Do you know of a reply that was written?

A. The reply to that particular letter?

Q. Yes. [144] A. I don't remember.

Q. If that is the fact as set up in that letter, did you continue to manufacture in May and June of 1947 in that financial condition? Did you continue to manufacture and carry on business in that condition?

A. We obviously continued through the years.

Q. You left San Francisco about the 26th of January to go South. Did you go by train, plane or automobile? A. I took the Daylight.

Q. And arrived there at what time, approximately?

(Testimony of John M. Storkerson.)

A. It would be in the early evening; that is easy to check; it is the scheduled Daylight train to Los Angeles.

Q. You met Hawkins or Hawkins met you on your arrival?

A. Well, I don't understand what you mean by that.

Q. Did you see Hawkins when you got there on January 26th?

A. Yes, I did.

Q. Where and when?

A. As I recall, he met me at the station.

Q. Had you communicated with him prior to leaving San Francisco when you would arrive?

A. Prior to leaving San Francisco?

Q. Yes.

A. The night I left—right before I left I communicated with him.

Q. By telephone? [145]

A. By telephone, as I recall.

Q. You did meet him that night, the 26th?

A. I met him the night of the 26th.

Q. Did you tell the Montgomery Brothers in your conference that you had with them on the 24th and 25th that you were in contact with Hawkins and were going to meet him before Ray Montgomery got there on the 27th?

A. I told the Montgomery Brothers when I was in San Francisco that I proposed to make an offer to hire Mr. Hawkins. I went—I called Mr. Hawkins; I made arrangements to meet him and I hired him on the evening of the 26th, and on the morning

(Testimony of John M. Storkerson.)

of the 27th the two of us met Mr. Montgomery, and I then told Mr. Montgomery or made it known to him that he had been hired that evening.

Q. And it is your testimony you had had no conversation with Hawkins, or any other member of your corporation, prior to the evening of January 26, 1949, wherein there was a discussion of this employment or proposed employment of Hawkins? No conversation of any kind?

Mr. Doyle: Just a moment. I don't understand the question.

Mr. Christin: Strike the question; reframe it.

Q. Is it your testimony that prior to January 26, 1949, neither you, nor so far as you know, had any officer of your company, had conversations with Hawkins which had appertained [146] to his employment by Fenwal?

Mr. Doyle: Let him tell about his own conversation, not about conversations that other people may have had, Mr. Christin. We will object to the question as calling for testimony of this witness about conversations that other people may have had.

Mr. Christin: I think it is admissible; I will bring it down,——

Mr. Doyle: It is compound.

Q. (By Mr. Christen): Did you yourself have any conversations with Hawkins covering the matters included in my last question?

A. I did.

Q. When and where?

A. The conversations were entirely by telephone.

(Testimony of John M. Storkerson.)

They took place on datings which I cannot remember, but which were around the first of the year, 1949.

Q. Did you have a long conversation—by that I mean many minutes—with Hawkins on the 31st day of December, 1948, from Ashland?

A. On the 31st day of December?

Q. December, '48?

A. I don't remember the exact time; I had a conversation with him approximately—I had conversations with him.

Q. And what were those conversations?

A. Do you wish me to give the essence of the conversations?

Q. I do. [147]

A. Mr. Hawkins, in calling me, told me that he had heard that we had sent a cancellation notice to Montgomery Brothers. He asked me if he had had anything to do with it. I told him no, that he had had absolutely nothing to do with it. He wanted to know how he would fit in the picture, was he going to be given an opportunity to come to work for Fenwal.

Q. I didn't get that last sentence.

A. Was he going—in essence, he asked me if he was going to be given an opportunity to come to work with Fenwal. And I told him at that time that I was going to make absolutely no commitments to him whatsoever, and that I was going to see Montgomery Brothers in San Francisco, and

(Testimony of John M. Storkerson.)

after I had seen them I would be glad to talk with him. That is the essence of the conversation.

Q. He asked you if there would be an opportunity for him to work with or for Fenwal; is that correct?

Mr. Doyle: Just a moment, please. This line of interrogation is obviously directed to the employment of Hawkins by Fenwal. That is the subject of the cross-complaint to which I have previously referred. It is not within the complaint or the answer. It was not inquired into on the direct examination of this witness. It is not a part of the Plaintiff's case in chief nor of the Defendants' defense thereto. I submit, therefore, that it is improper interrogation at this time, and before that matter is inquired into in the regular [148] course of the proceedings, as I assume it will be, I should like to be heard on the motion to dismiss the cross-complaint.

The Court: I am going to decide the cross-complaint when I pass on the merits. I think I had just as well hear this now, Mr. Doyle.

Mr. Christin: The question, please, Mr. Reporter, through the Court.

. (The Reporter read the question.)

A. For Fenwal, yes.

Q. (By Mr. Christin): You realized the amount of business that was being done by Montgomery Brothers in Fenwal's products in the year 1948 in this area, didn't you? I mean the Pacific Coast?

(Testimony of John M. Storkerson.)

A. In general terms, yes, sir.

Q. And you had given notice of termination on the 31st day of December—29th day of December, 1948, is that not true?

A. On the last day of December of 1948, yes.

Q. Is it your testimony that when you mailed that letter of the 29th, terminating the contract in 60 days, that you had no definite arrangement for anybody to take over that business on the Pacific Coast as of the 1st of March?

A. With anybody outside of our own company or any thoughts along that line we may have had, with this exception; we had absolutely no discussion of that matter——

Q. I am asking you, so far as you were concerned, when you sent [149] that letter you had no one definitely in mind to carry on operations after the effective date of the termination?

A. We had no one definitely in mind?

Q. That's right.

A. Yes, I believe we had hoped that it would be possible to secure the services of Mr. Hawkins after I talked with Montgomery Brothers.

Q. After you had talked with Montgomery Brothers? A. Yes, sir.

Q. Did you tell Montgomery Brothers in the conference on the 25th—the 24th of January, 1949, that you had had these telephone calls with Hawkins in the latter part of December, 1948? Did you tell them that in your conference with them?

A. I don't remember that I did so.

(Testimony of John M. Storkerson.)

Q. You don't know whether you did or not?

A. I don't remember.

Q. Did you write them any letters of any kind telling them of your negotiations or conferences or conversations with Hawkins pertaining to his employment by you?

A. Did I write to Montgomery Brothers?

Q. Yes. A. No, sir.

Q. On about the 25th of May, 1948, did you have a sales meeting at Ashland, Massachusetts?

A. In May of '48? [150]

Q. Yes.

A. Yes, sir, it was about that period, as I recall it.

Q. Did you attend that? A. I did, sir.

Q. Was Mr. Walter, your President, there?

A. He was.

Q. And Mr. Robinson? Who is Mr. Robinson in your organization?

A. Mr. Robinson is our Sales Manager.

Q. Did he attend that meeting?

A. He did, sir.

Q. What was the purpose of that meeting?

A. The purpose of that meeting was simply to gather together representatives of our company from all over the country to further their knowledge of our products and the application of the product in order to help them in their selling effort.

Q. And did you know at that time that Mr. Hawkins had been requested to come to that sales meeting by your organization and deliver a paper

(Testimony of John M. Storkerson.)

which in substance was called "Applicability of Thermostatic Switch Control to Airplanes"?

A. I wasn't part of the group who made up the schedule. Of course it was obvious that I knew he was giving the paper when he was there.

Q. Did he give such a paper?

A. It is my understanding. [151]

Q. Did you hear him? A. I did not, sir.

Q. At that time you were General Manager?

A. Yes, sir.

Q. Did you at that time believe that Hawkins was qualified to give a paper on that subject to the other salesmen or to the other representatives of Fenwal at that time and place?

A. I didn't know Mr. Hawkins prior to that time. I had no way in which I could judge his ability to give such a paper.

Q. Who in your organization, so far as you know, would have extended that invitation to speak?

A. Presumably it would be done by our sales organization under Mr. Robinson.

Q. Now, following that meeting or about the time of that meeting did you have any program with the other executives to promote and enhance the sales of your products through your representatives to give them a good sales talk to increase their sales?

A. We had a program in which we discussed with the salesmen information which would help them sell better.

Q. By salesmen, you mean representatives?

(Testimony of John M. Storkerson.)

A. Representatives.

Q. Among which were Montgomery Brothers?

A. That is correct.

Q. At what capacity was your plant operating in May, 1948? [152]

A. That is a very difficult thing to state accurately. It was low.

Q. Was it 25 per cent?

A. I think it was probably higher than that; I think it was probably more on the order of 50 per cent, but I don't recall.

Q. As General Manager did you keep conversant with the purchase orders and sales made by Montgomery Brothers in this territory? Was that in your duties? A. It is not in my duties.

Q. You at no time then knew how Montgomery Brothers were progressing so far as sales were concerned, or purchases? A. Only in general.

Q. Would you know whether it was good or bad?

A. At that time I may have. At this particular time I don't recall.

Q. I call your attention to an inter-office communication of Fenwal Incorporated dated May 25, 1948, and ask you if that was uttered by your Mr. Robinson?

Mr. Doyle: You mean you are asking if that is Mr. Robinson's signature?

Mr. Christin: No, if it was prepared and sent out by Mr. Robinson in the ordinary course of business?

(Testimony of John M. Storkerson.)

A. Looking at his signature, it is apparently his letter.

Mr. Christin: I will offer it in evidence and ask that it be marked next in order. [153]

The Clerk: Defendant's Exhibit A in evidence.

(Letter, Fenwal to Montgomery, May 25, 1948, marked Defendant's Exhibit A in evidence.)

DEFENDANT'S EXHIBIT A

Inter Office
Fenwal Incorporated
Ashland, Massachusetts

Date: May 25, 1948
(dic. 5-24-48)

To: Montgomery Brothers—San Francisco
From: Mr. C. J. Robinson
Subject: Sales Conference

Attention: Mr. F. H. Montgomery

We put Edgar and Dick on the train Sunday afternoon. It was certainly a pleasure to have them with us. Saturday afternoon, we had a long discussion of some of our mutual problems. I made notes at this conference, and the purpose of this letter is to give you full information.

Both Edgar and Dick were quite concerned about the work which we are doing at Wright Field. They felt that we were not succeeding in our endeavors as yet, to the point where we are getting our fire

(Testimony of John M. Storkerson.)

Defendant's Exhibit A—(Continued)

detectors recommended to aircraft companies. I am not going into a long discourse on what we are doing. This has been given in detail to both Edgar and Dick. I think when you discuss the matter with them you will find that we have done a lot more at Wright Field than anybody realized.

But in order to assist us in our work at Wright Field, we again requested that Edgar and Dick get the aircraft companies in your territory to write to Wright Field requesting approval of our fire detectors. We further requested that if the companies wrote to Wright Field for this approval, Edgar and Dick be shown copies of the replies. This is most important because, in accordance with procedure at Wright Field, the word "approval" or "disapproval" must be used—not words such as, "We recommend the use of * * *," or "We suggest the use of * * *." Edgar can explain this to you. Without your help in getting these letters written and copies of replies sent to us, if possible, we have no evidence to present at Wright Field. I can assure you that with this evidence, I can turn the place upside down.

As an alternate, if such letters of approval cannot be written, we asked that Edgar and Dick ask to see copies of present correspondence received from Wright Field which may say, "We recommend, (or suggest) the use of (Fenwal detector) or (Silverwin detector)." If such letters are shown to them, they are to see if they can obtain copies. If not, they are

(Testimony of John M. Storkerson.)

Defendant's Exhibit A—(Continued)

to make note of the date of the letter, the code number on the letter from Wright Field, the sense of the wording contained therein and the name of the person writing the letter. Even with this information I can go to Wright Field and insist on seeing a copy of the letter. I have done this before; I know I can do it again. You get the facts as requested. I can assure you I will take care of the rest.

We agreed as we have done in the past to furnish you with all information regarding our transactions at Wright Field wherein it is possible to do so, so that you will be fully advised of all that transpires.

On to another subject. We agreed with Dick Reed that we would keep him constantly advised as to the information obtained from transactions at Boeing, Wichita, and Dick was apparently of the opinion that Fraser D. Moore was not quite competent to handle work at the Boeing, Wichita plant. This, of course, is not so, and after discussing the matter with Dick, I think he feels entirely differently about it. F. D. Moore is competent and is well liked at Boeing, Wichita. The purpose of this discussion was to make certain that the proper liaison is maintained among Montgomery Brothers, F. D. Moore, Fenwal, Boeing, Seattle, and Boeing, Wichita.

Edgar advises that he and Ray have discussed a resale project of our switches with Douglas. Edgar agrees that, immediately upon his return, he will write up a report on this tentative discussion which

(Testimony of John M. Storkerson.)

Defendant's Exhibit A—(Continued)

was held recently, and hopes that by that time, he will be able to furnish us with Douglas's intended prices for our review.

Dick Reed discussed recent tests run at Boeing on our compression type Thermoswitch which they have received. We told Dick that we had had some trouble with these Thermoswitches changing temperature setting when exposed to periods of overshoot, and realizing this, we have changed the design somewhat to incorporate the aircraft fire detector end assembly. With this feature, we have been able to make a Thermoswitch which is extremely remarkable in its repeatability in operation. Dick has a report of a test conducted on two of these Thermoswitches on Saturday. You will get copies of this report from him. For your information, we have manufactured and tested 200 of these new type compression Thermoswitches, and have made shipments of these to both Douglas and Boeing. Both Edgar and Dick will take the matter on from there. All compression Thermoswitches being manufactured at present incorporate this new feature.

Both Dick and Edgar felt that if they could do some work at Wright Field, it might assist all of us. However, we do not believe that this is your responsibility, nor do we believe, under the present circumstances, that this should be permitted. Edgar will give you the reasons why. We did, however, agree to permit Dick Reed to go to Wright Field and meet the Project Officer on the XB-47. Dick

(Testimony of John M. Storkerson.)

Defendant's Exhibit A—(Continued)

will take care of this. We have specifically requested that he stay away from the Equipment Laboratory and his approach to the Project Officer is to be that he is traveling through Dayton on his way to the West Coast, that he is the Fenwal representative at Seattle, that he wished to make the acquaintance of the Project Officer, etc.

In line with this, we have asked Dick and Edgar to furnish us with the names of all the Project Officers at Wright Field handling experimental aircraft on which you are trying to get Fenwal Thermoswitches and Fenwal Fire Detectors specified. With this information, we too can contact these Project Officers.

Ed Poitras showed both of the boys a new terminal type Thermoswitch which is in development. Either one of them can describe this to you. It is not ready for release at present.

Edgar Hawkins very kindly brought with him another Silverwin fire detector. We are going to send to him directly, at Los Angeles, another Room Thermoswitch. We will continue tests on this Silverwin detector and furnish a complete report to you.

Edgar advised that he was going to stop at Lake Muroc and do one day's work and see what was going on and what further information he could pick up. He is to write us a complete report on this visit.

I know that you can appreciate the seriousness

(Testimony of John M. Storkerson.)

Defendant's Exhibit A—(Continued)

of this aircraft program. It requires close work between Montgomery Brothers and Fenwal. We, therefore, have requested that Edgar and Dick furnish us periodically reports of their visits to the aircraft companies. These do not have to be detailed, but we do like to know what is going on in order that we can offer suggestions and assistance. Both of the boys have agreed to writing these reports. We trust that you will stand back of their decision.

Dick Reed wanted four samples of a rate-of-rise Thermoswitch for use in connection with the Boeing heater problem. He intends to apply them, as has Edgar, on the DC-6 tests. However, the decision to give these samples to him depends somewhat upon Ed Poitras' opinion. I must be brief in this since Ed Poitras has all the facts as he spent all Saturday morning discussing this problem with Dick and Edgar. More information on this later. If Ed Poitras feels the samples should be forwarded, you will, of course, get a full report on the decision.

I spent some time talking with Edgar and Dick about the allocation of their selling time to aircraft companies. We feel that the volume of business to be obtained from aircraft manufacturers is extremely high. I am not going into detail regarding this matter because I went over it with Ray when he was here. Regarding the intended proposal which Edgar discussed with me relative to increased compensation for sales to the aircraft industries, it

(Testimony of John M. Storkerson.)

Defendant's Exhibit A—(Continued)

is our decision that this proposal cannot be entertained under any circumstances, and that our present agreements for compensation are to stand until such time as I have had the opportunity of further reviewing the matter as agreed between Ray and myself. Please remember that since Ray's visit, I have been completely tied up with the Sales Conference. Within the next two weeks, I will write you more fully regarding this subject.

I think both of the boys learned a lot during their visit. They certainly returned with their pockets loaded with samples. We all had a good time. I wish both you and Ray could have been here. The theme of the Sales Conference was, naturally, "more sales," and when we say more sales, we mean more diversified sales, sales in small quantities and more sales in volume quantities.

The factory, at present, is operating at 25% capacity. We have marvelous equipment and facilities for operating at 100% capacity. We sincerely wish more business, and intend to expend our every effort in giving you cooperation and service.

Very truly yours,

FENWAL INCORPORATED,

/s/ C. J. ROBINSON,

Sales Manager.

CJR:dd

Received May 27, 1948.

[Endorsed]: Filed July 12, 1950.

(Testimony of John M. Storkerson.)

Q. (By Mr. Christin): Reading from the last paragraph thereof as follows:

“The factory at present is operating at 25 per cent capacity. We have marvelous equipment and facilities for operating at 100 per cent capacity. We sincerely wish more business, and intend to expend our every effort in giving you cooperation and service.”

You knew that that was the policy of the company at that time, is that correct?

A. That is right.

Q. It is true, is it not, you were operating at that time at 25 per cent capacity?

A. That is an approximate figure; it could be figured several ways.

Q. At that meeting did you meet Mr. Fred Montgomery and Mr. Ray Montgomery in May?

A. I believe not.

Q. Did you meet Mr. Hawkins?

A. I met him, yes.

Q. Now, then, did you at that time know—I mean in May, 1948—the sales situation for the month of May, June, July, August and September—no, strike that.

Did you in May know what sales had been made by Montgomery [154] Brothers in April of 1948?

A. I'm sorry; may I have the question?

Q. Did you at the May meeting know the sales that had been made in April of 1948 by Montgomery Brothers?

(Testimony of John M. Storkerson.)

A. In May? I may have at that time; I don't remember.

Q. Did you know that business generally was not so good in the United States at that time—your business?

A. As a matter of fact, as I recall, I think that our business was—I know that our business was—May I rephrase that? I know that at that time business in general was not as good as it had been previously, because it was after the war.

Q. And that is one of the reasons why that program was carried out with the salesmen to pep up sales?

A. That is correct.

Q. Now, if these figures are correct that the April sales for Montgomery Brothers in 1948 were \$14,600, in May they were \$14,787, in June they were \$23,204, in July they were \$10,772, August \$8,359, September \$36,450, October \$34,600, November \$34,000, and December \$34,400, did you know of that uptrend in business as it was being reflected by your books or by your reports, as the General Manager?

Mr. Doyle: Pardon me, Mr. Christin. Is it your statement that those figures you have read were the Montgomery sales——

Mr. Christin: That is right.

Mr. Doyle (Continuing): —— to its customers, or the Fenwal sales to Montgomery in those [155] months?

Mr. Christin: Those are purchases from——

Mr. Doyle: Purchases from Fenwal?

(Testimony of John M. Storkerson.)

Mr. Christin: That is correct.

Mr. Doyle: And you are asking this witness whether he knows that is the fact?

Mr. Christin: Yes, as those sales were reflected in those months. Were you aware of that fact as General Manager?

A. Yes, because—I believe I am aware of it because it is exactly in line with the activity in the aircraft industry.

Q. Exactly so. Now, the purchases by Montgomery Brothers in those months constituted a large part of your production?

A. A substantial part of our production.

Q. When you use the word “substantial” can you reduce that to a fractional basis?

A. It would vary from month to month; sometimes I may say it was a quarter. It might vary.

Q. In other words, in your opinion, at that time in those months as the General Manager, was that business satisfactory in this area?

A. It depends on how you mean the question. If you mean by that, Mr. Christin, were we satisfied that that amount exhibited particular effort on the part of Montgomery Brothers, I would say no.

Q. But it was a substantial increase, wasn't it, from \$8,000 in August and \$10,000 in July to \$36,000, \$34,000 and \$30,000 [156] for the months of September, October, November and December, wasn't it?

A. Yes.

Q. Did you have any discussion of any kind or character with Dr. Walter in the month of Sep-

(Testimony of John M. Storkerson.)

tember or prior to the middle of September, 1948, as to his coming West on a trip?

A. I may have; I don't remember.

Q. Well, did Dr. Walter come West on a trip in September?

A. It is my understanding that he did.

Q. It was to attend a medical conference in Los Angeles, was it not?

A. I'm not personally familiar with the situation.

Q. Was he on a business trip or was he here as a Harvard Professor in Medicine to attend a medical convention in Los Angeles?

A. I believe he told me some medical meeting.

Q. Do you know a Dr. Charles Hafnegal?

A. No, sir.

Q. Did Dr. Walter and you discuss the advisability of Dr. Walter meeting, seeing Mr. Hawkins in Los Angeles to have some conversations with him about future plans of Fenwal on the Pacific Coast?

A. As I recall, Dr. Walter mentioned that he would like to see Mr. Hawkins. The balance of his conversation I don't remember. [157]

Q. As General Manager, didn't you discuss with him why did he want to see Mr. Hawkins?

A. No, sir, I don't believe so, because it would be very perfunctory in the various cities he has gone to; he has been our representative many times.

Q. When Dr. Walter returned—how long was that trip? A. I don't remember.

Q. Could you approximate when he got back?

(Testimony of John M. Storkerson.)

A. I can't remember that, sir.

Q. Would it be in September or October?

A. I wouldn't know, sir.

Q. When did you next see him that year after September?

A. I couldn't tell you, sir. I don't think that he was gone too long. I saw him when he came back from the trip; I can't personally place when the trip was.

Q. Do you have a directors meeting monthly?

A. Yes, we do.

Q. Do you recall whether he was there on the October meeting?

A. No, sir, because we had continued meetings.

Q. When he came back did he tell you that he had seen Mr. Hawkins in Los Angeles on two occasions where he had long conferences?

A. He told me he had talked with Mr. Hawkins.

Q. What did he tell you he had talked to Mr. Hawkins about?

A. He had talked with Mr. Hawkins, he told me, as I recall, he [158] had talked to Mr. Hawkins about the situation on the West Coast business.

Q. Did he tell you that he had told Mr. Hawkins during those conferences in Los Angeles that Fenwal was going to cancel out Montgomery Brothers?

A. He didn't tell me that, sir.

Q. Didn't he tell you at all or anything that he had in substance asked Edgar Hawkins what would be the best way to conduct the business on the Coast after you had cancelled out Montgomery Brothers,

(Testimony of John M. Storkerson.)

either by employment or as an employee or as a representative of the factory the same as Montgomery Brothers? Didn't he report anything of that kind to you at all?

A. He, as I recall—I remember he told us something about the—he told us that he had had discussions with Hawkins about the situation on the West Coast.

Q. Well, what did he say? What kind of discussions? What did he talk about? Weren't you interested as General Manager?

A. He said that he had questioned Mr. Hawkins on what kind of coverage we were getting and how much activity was being spent on behalf of Fenwal and by what people.

Q. Did he tell you anything about having told Hawkins that you were going to terminate as of 60 days after January 1, 1949, or December 30th?

A. Dr. Walter said nothing to me about advising Hawkins we were going to terminate. [159]

Q. Did he in substance tell you this: That he asked Hawkins for suggestions as to what should be done on the Pacific Coast and that he asked Hawkins about—he told Hawkins about the tentative plans that Fenwal had to set up representatives, manufacturers representatives, and that Fenwal was looking for accounts and that he asked for details?

Mr. Doyle: Let's take these one at a time, please.

Mr. Christin: You are quite right, counsel.

(Testimony of John M. Storkerson.)

Q. Did he tell you, in substance, that he had discussed with Hawkins certain policies that Montgomery Brothers were following on the Pacific Coast?

A. Did he discuss certain policies of Montgomery Brothers?

Q. Yes, with Hawkins, and reported that back to you?

A. I don't know what is meant by the question just generally "certain policies."

Q. Well, did he tell you that Hawkins had told him that he thought Montgomery Brothers could use better policies than they had been using in Los Angeles?

A. The essence of his reports was of that nature.

Q. And he told you he discussed that with Hawkins, did he, when he got back, I mean the Doctor did?

A. The Doctor did what, sir?

Q. Did the doctor tell you he had had this conversation about certain policies of Montgomery Brothers that were in effect that might be improved if Montgomery Brothers were out of [160] the picture? Did the doctor say that he discussed that with Hawkins?

A. I don't remember that specifically.

Q. Did he say that Fenwal would entertain a proposal from a new group to be formed of Montgomery employees after the termination; that that had been discussed with Hawkins?

A. He mentioned that it had been discussed; that

(Testimony of John M. Storkerson.)

something of that nature had been discussed with Hawkins.

Q. Tell us what you remember he said about the whole thing. You remember that, don't you?

A. I remember very little on that particular point. As I recall, I only saw Dr. Walter briefly when he came back.

Q. As General—pardon me.

A. As I recall, he mentioned the fact, I believe, Mr. Hawkins mentioned to him that the Montgomery Brothers were working with their people on some new group within their company.

Q. You remember that now?

A. I beg your pardon?

Q. You remember that?

A. I remember something of that kind.

Q. Did he say that he had told Hawkins that he, Dr. Walter, thought the only way to handle it was to have a factory representative in Los Angeles and not an employee? A. I don't remember.

Q. As General Manager, of Fenwal Company at that time, having [161] learned that much of the conversation, weren't you interested in getting from Dr. Walter the whole picture on the Pacific Coast where so much business was emanating from?

A. At that particular time I was principally interested in production problems and engineering problems, sir.

Q. When, so far as you know, was it determined by Fenwal to write the letter of December 29 terminating that contract? When was that?

(Testimony of John M. Storkerson.)

A. As near as I can recall, it was some time in early December.

Q. Well, how early? Have you got any date on it?

A. I know there was a running discussion on the matter; there had been for a long time.

Q. I beg your pardon?

A. I know there was a running discussion on the matter.

Q. Well, before the letter of December 21st, which was delivered on the 29th of December—I mean the 31st of December to Montgomery Brothers by mail, had you in any way told Montgomery Brothers that you anticipated the termination of that contract before you wrote that letter?

A. Had I told Montgomery Brothers?

Q. You, as General Manager.

A. That we were going to terminate that contract?

Q. Yes, sir.

A. Prior to the time we sent the letter?

Q. Yes. [162] A. No, sir.

Q. So far as you know, had any other executive authorized to utter that information told Montgomery Brothers? A. No, sir.

Mr. Christin: Do you want to take a recess?

(Recess.)

Q. (By Mr. Christin): After Dr. Walter returned from the West Coast to Ashland do you re-

(Testimony of John M. Storkerson.)

call Mr. Ray Montgomery coming to Ashland in October, 1948? A. I do.

Q. You do. Did you have conversations with him at that time and place? A. I did.

Q. And who was present at those conversations?

A. Mr. Ray Montgomery and myself.

Q. Just you two, as far as you know?

A. As I recall.

Q. Did you on that occasion in substance tell him that Dr. Walter had had these conversations with his employee or his Los Angeles Manager in Los Angeles in the month of September?

A. I did not.

Q. You at that time knew—I mean, when you saw Ray Montgomery there in October you knew that Dr. Walter had had conferences with Mr. Hawkins, their General Manager in Los Angeles, in September? [163]

A. Possibly so, but I had no direct conversations with Mr. Montgomery insofar as matters requested by Mr. Montgomery of Mr. Robinson; all I did was to sit and take notes.

Q. Was Mr. Robinson in any conference with you and Mr. Ray Montgomery in any time in October, the three of you?

A. As I recall, Mr. Montgomery got in touch with Mr. Robinson and told him he wanted to see him. Mr. Robinson advised Mr. Montgomery that he was going away on vacation, and Mr. Montgomery came anyway. And therefore I took the notes of what he was going to ask.

(Testimony of John M. Storkerson.)

Q. Do you know whether Mr. Ray Montgomery saw Dr. Walter on the October visit?

A. I wouldn't know, sir.

Q. Would you tell me what was said by you and Ray Montgomery in any of those conferences or conversations in October in Ashland, in October, 1948? What is the best of your recollection?

A. I don't recall that very much was said. As I recall, he came in in a hurry with a number of detailed commercial items, on which I took notes for Mr. Robinson.

Q. In the month of December, 1948, did you know what articles were being handled by Mr. Hawkins as the Los Angeles Manager for Montgomery Brothers other than Fenwal products?

A. Other than Fenwal?

Q. Yes. [164] A. No, sir.

Q. Did you know at that time that Montgomery Brothers were handling other lines than Fenwal?

A. Yes, I did.

Q. What lines were those?

A. The Krumlox(?) Line.

Q. Is that a Wiegand product?

A. Wiegand product.

Q. Did you know of any other products they were handling?

A. Yes, I heard of a number of them; I don't recall the names of the various companies.

Q. Did you know that Mr. Hawkins, as Manager of the Los Angeles office, was handling all of the lines of Montgomery Brothers, including Fenwal?

(Testimony of John M. Storkerson.)

A. I didn't know that Mr. Hawkins was Manager of the office. I do know, though, that when various members of our company came back, it was one of our complaints that not enough time was being spent on our own products in Los Angeles.

Q. Even though the sales had jumped up to \$266,000——

A. That is correct.

Q. That wasn't satisfactory?

A. It isn't a question of the sales being satisfactory; it is a question of the amount of effort being put in on our behalf.

Q. Did you ever write any letters to Montgomery Brothers calling their attention that they were delinquent in any respect [165] in their representation of your company on the Pacific Coast?

A. I received a number of reports from our own people as to discussions——

Q. I didn't ask you that; I asked you, did you communicate with them in any way or ways in writing that their representation of your company on the Pacific Coast was unsatisfactory?

A. You mean my company?

Q. You. A. I personally, no.

Q. Did you know that Montgomery Brothers have an office in Portland, Oregon?

A. Yes, I do.

Q. Do you know that Montgomery Brothers have an office in Seattle? A. Yes, sir.

Q. And did you know who handled the Fenwal Line for Montgomery Brothers in Seattle?

(Testimony of John M. Storkerson.)

A. I understood that Mr. Reed had given a very small portion of his time to Fenwal.

Q. I didn't ask you that. I asked you did you know who handled the line with the Boeing Air people in Seattle from Fenwal for Montgomery?

A. I understood it was Mr. Reed, sir.

Q. Did you know Mr. Reed?

A. I had met Mr. Reed. [166]

Q. When did you meet Mr. Reed for the first time? A. At the sales conference.

Q. And did you meet Mr. Reed in Seattle on or about the 20th or 21st day of January, 1948?

Mr. Doyle: '48?

Mr. Christin: I beg your pardon; '49. Thank you.

The Witness: On or about what date? What date in January?

Mr. Christin: Well, you name the date on this trip West when you landed here on the 24th.

A. Yes.

Q. You stopped off at Seattle, did you?

A. Yes, I did.

Q. And how near to the 24th?

A. It was the Monday before—it was Friday, as I recall, before the Monday I was in San Francisco. I believe that makes it the 22nd, or something like that.

Q. What was the purpose of your seeing Mr. Reed in Seattle?

A. The purpose of my seeing Mr. Reed, I merely called him because I was going through town.

(Testimony of John M. Storkerson.)

Q. Is that all?

A. I had other business in town.

Q. Didn't you go with him to the airplane companies?

A. I did. I was invited to go out with him to the Boeing Aircraft Company.

Q. What did you do out there? [167]

A. We went through the shop and talked to several of the engineers.

Q. Did you meet the Production Engineer?

A. We met the Production Engineer, yes.

Q. Was anything said by you to them of a contemplated change in the Pacific Coast representation?

A. No, I had talked with the purchasing people the day before.

Q. You had gone to see the airplane people the day before you saw Reed, is that right?

A. Yes, sir.

Q. By that you mean Boeing? A. Yes.

Q. Whom did you see there the day before you went out with Mr. Reed?

A. Mr. N. W. Gregg.

Q. Did you have a conversation with him?

A. Yes, sir.

Q. Did you tell him that you were going to make a change on the Pacific Coast?

A. I told him we were contemplating making a change.

Q. Did you tell him who was going to be in charge? A. I did not.

(Testimony of John M. Storkerson.)

Q. Did you have a conversation with Mr. Reed which in substance was as follows: that you asked Mr. Reed to leave [168] Montgomery Brothers in that area and take over the representation of Fenwal in Seattle with Boeing? A. I did not, sir.

Q. Nothing of that kind at all?

A. No, sir.

Q. Who was going to handle the Seattle business if you did terminate with Montgomery?

A. We had—that was one of the reasons I went to Boeing to discuss it with them, because we had a number of plans.

Q. Plans? A. Yes, sir.

Q. And during your association with Fenwal did Fenwal ever directly on the Pacific Coast sell to the manufacturers, or was it always done through a representative?

A. I believe in the early days of the business we sold direct. And if you mean by “sold” selling effort, we have not done so since Montgomery Brothers——

Q. I am not talking about selling efforts; I am asking you, since you were there in 1945—I believe that is when you became associated with Fenwal—is that '45? A. Yes.

Q. Was any direct sale made by Fenwal to manufacturers on the Pacific Coast?

A. Was any sale a result of our effort on the West Coast?

Q. No, I didn't say that. Did you sell directly, or always [169] through this method of Mont-

(Testimony of John M. Storkerson.)

gomery buying from you and you making delivery to the manufacturer?

A. Selling is the product of effort getting the purchase order, we had people out here helping Montgomery Brothers sell on many occasions.

Q. Who came?

A. W. J. Turrene, E. J. Poitras—W. J. Turrene, C. J. Robinson, and others.

Q. Do you of your own knowledge—by “own knowledge” I mean being present on the Coast with any of these gentlemen—know what they personally did on the Coast, by being with them here, of your own knowledge? A. No, sir.

Q. This article that you manufacture, I understand it is of two kinds; one is the fire control thermostat to be used on airplanes and the other one is the ordinary switch manufactured by you, is that correct?

A. No, sir, Mr. Christin, we make many, many kinds of thermostats.

Q. With particular reference to the one used in the aviation industry, you have a patent on that article? A. We do. Which one did you say?

Q. The one that is sold to the aviation industry.

A. That is plural, the different switches that—

Q. Put it this way: All switches manufactured by you and used [170] in the airplane industry are patented? A. Correct.

Q. So they cannot be bought or similar articles cannot be bought from any other manufacturer than you? A. The same article, right.

(Testimony of John M. Storkerson.)

Q. You did tell the Court, I think in response to His Honor Judge McColloch's question, that you had competition?

A. We do have competition.

Q. What is that competition?

A. Our competition comes from companies who approach these various problems from a different principle. I believe I can point out to you, as for example, fire detection, we make a unit, fire detector of our own special design. In competition with us there have been a number of other types such as the Willcolator (?) switch, which has been used on the West Coast. Also there is another approach on the Wright (?) type, and there have been others from time to time.

Q. Is it a fact that your fire control switch is the one that is used on all standard airplanes, by that I mean Lockheed, Douglas, Northrup?

A. It is used by a substantial number.

Q. And you knew when you terminated at Montgomery that they could not or would have great difficulty in finding any competing article to supplant yours for the carrying on of that [171] business?

A. I beg your pardon?

Q. You knew when you terminated Montgomery that there was no other product available to them as good or could compete successfully with the fire control switch that you were then selling to them and selling to the airplane manufacturers?

A. If you are speaking of the quality of our merchandise, I would agree; but there are certainly

(Testimony of John M. Storkerson.)

other items on the market which they could secure which are in competition.

Q. None of these other articles were being used by the Pacific Coast airplane manufacturers during the years '48 and '47?

A. I believe so.

Q. Which companies used that competing article?

A. You mean the manufacturer, aircraft manufacturer? Oh, I believe Douglas, for example, has somebody's fire detection system used as part of their aircraft. I am not sure about that.

Q. These orders that were lodged with you in January and February, some were accepted and some weren't?

A. Correct.

Q. What method did you use to determine which were accepted and which were not?

A. We did not feel called upon to accept any order that we did not agree that all of the conditions of that order were satisfactory to us; and the ones that were for immediate shipment we didn't question; therefore we accepted them. [172]

Q. But prior to the months of January and February, 1949, you had accepted all orders?

A. We had accepted them after the usual checking, if they were straightened out to our satisfaction.

Q. But you refused to accept some of the January and February orders even though you made the usual check?

(Testimony of John M. Storkerson.)

A. We refused some of the January and February orders.

Q. Now, the sales to Montgomery Brothers for the months of January and February, as I understand it——

A. Mr. Christin, may I correct my last statement slightly. I said we refused. We did not refuse; we just didn't accept.

Mr. Christin: I beg your pardon?

(The Reporter read the answer.)

Q. In the past you had by some affirmative act accepted the order and not just done nothing about it; is that right? A. I couldn't hear you.

Q. I mean in the prior months before January and February you would do some affirmative act to accept, such as processing the order; there would be some affirmative act?

A. I'm sorry; I can't understand.

Q. Prior to January and February, 1949, any orders that were lodged you would process the order and thereby accept it, is that correct?

A. Yes, sir.

Q. But some of the orders in January and February, 1949, you [173] didn't?

A. That's right.

Q. Now, how did you determine which to process and which not to process, or, in other words, which to accept or not accept?

A. We accepted the ones that we would give de-

(Testimony of John M. Storkerson.)

livery on before—prior to the termination date with Montgomery Brothers, roughly.

Q. Those orders in those two months amounted to approximately \$166,000, didn't they?

A. Excuse me.

Q. The orders which had been lodged with you amounted to \$166,192 for those two months, is that correct?

A. I wouldn't know.

Q. If those figures are correct, that would be the amount? We will prove those later.

A. Correct.

Q. And the selling price of those articles by Montgomery Brothers to their trade was \$202,548? If that figure is correct, that will be your answer, is that right?

A. Yes.

Q. Now, what had you done so far as Fenwal is concerned to obtain those orders which were lodged with you in January and February, 1949?

A. Insofar as obtaining this first section, we had provided our usual services to Montgomery Brothers. That was our contribution.

Q. What services were those? [174]

A. Technical services; providing all the information they need to sell particular applications. Any—we sent many, many letters out there on the particular applications regarding technical application problems and so forth.

Q. But had you done anything different about obtaining the orders in January and February, 1949, than you had done to obtain orders in any month in 1948?

A. No, sir.

(Testimony of John M. Storkerson.)

Q. So, then, as of that time when those orders were lodged with you in January and February, when they were filed, except for cancellations Montgomery would have had a profit of \$36,355? If that is the correct amount you would answer yes, would you? A. Yes.

Q. You knew Montgomery Brothers were claiming that entire amount of profit, is that right?

A. That's right.

Q. And you did continue to fill some of the orders in January and February? A. Yes.

Q. And you took an assignment of all the other orders in March, 1949, is that right?

A. In effect, yes.

Q. And you have filled those orders of March, 1949, up to the present time? [175]

A. Yes.

Q. And it is your contention that you should keep all of the profit yourself, to wit: the difference between——

Mr. Doyle: The pleadings in this case speak for themselves. I think you can get from the pleadings what the position of the parties is.

The Court: This isn't pleading; this is evidence. I know what your positions will be in that regard, but I want Mr. Christin to get all the facts about this particular matter.

Mr. Christin: As a matter of fact—I was interrupted there by counsel.

Mr. Doyle: I beg your pardon, Mr. Christin. Perhaps the Reporter can read your statement.

(Testimony of John M. Storkerson.)

Mr. Christin: Your Honor, I never had the pleasure of practicing before Your Honor, although I always use your decisions in OPA matters. But you told us when you opened up you were disposed to hear all the facts, so I want to try to get them all at one time.

Q. Put it this way: You know that the amount I told you, \$36,355, is the difference between what Montgomery Brothers bought those articles from you for and what they resold them to their customers for? A. That is my understanding.

Q. And it is your contention you want to keep all of that? A. I don't think—— [176]

Q. Is that the nature of your contention?

Mr. Doyle: Let him answer the question. You asked it, let him answer it.

A. I don't think that that question has anything to do with it, because, in the first place, when our payments were refused our company we certainly couldn't be expected to go on and ship continuously fifty or a hundred thousand dollars a month when we have a limited working capital and keep on shipping and shipping with absolutely no hope of income of money on which to do business. We would have been ruined in a short time.

Q. (By Mr. Christin): You had asked Montgomery Brothers before for an assignment, hadn't you, of these contracts? A. I had.

Q. When did you ask for the assignment of these contracts? A. In January.

Q. Did they refuse it?

(Testimony of John M. Storkerson.)

A. No; the substance of that conversation, as I recall it, was—in the first place, when I came to San Francisco, we tried to—I was there for the purpose of dissolving the association between them and ourselves, and how much profit they should retain——

Q. Answer the question: Did they refuse or not refuse the assignments when you asked them?

A. When I first asked them?

Q. Yes. [177]

A. I don't think they were asked for it at first.

Q. I thought you said the other day you discussed it on the January conference?

A. We did discuss it.

Q. When you asked for it in March in Los Angeles you got it right away, didn't you?

Mr. Doyle: His testimony was not that he asked for——

Q. (By Mr. Christin): You asked for it in March, didn't you? You went out to the airplane companies and arranged for an assignment in March?

A. I suggested it to Mr. Montgomery, that the only way the argument could be settled in a manner which would take care of the question of profits and the airplane companies, would be on the basis of an assignment, or some such method.

Q. He acquiesced right away, didn't he?

A. He acquiesced, yes, with certain provisos.

Mr. Christin: That is all.

(Testimony of John M. Storkerson.)

Redirect Examination

By Mr. Doyle:

Q. Mr. Storkerson, Mr. Christin asked you about your trip to Seattle on January 21, 1949, and you stated that you saw a Mr. Gregg of Boeing Aircraft? A. I did, sir.

Q. You told Mr. Christin what you said to Mr. Gregg: That you were contemplating a change from Montgomery Brothers. What did Mr. Gregg say to you?

A. Mr. Gregg said to me that, in connection with our consideration [178] of whether we should set up a factory representative as we had had in their territory, that it was the policy of their company that they preferred to deal directly with the principal and he would appreciate it if we would deal directly from our factory to their factory so that they could be dealing with the people who built and were responsible for the switches.

Q. That they preferred that to a manufacturer's representative arrangement?

A. Yes, they did.

Q. Mr. Christin asked you, and I believe you replied, that you didn't seek to employ Mr. Reed of the Montgomery organization at that time or at all; is that correct? A. That is correct.

Q. Did Mr. Reed then seek employment from you?

A. He sought employment from me on the second visit to Seattle.

(Testimony of John M. Storkerson.)

Q. Was that the January visit or a later visit?

A. That was the visit in March.

Q. Did you accept or reject his proposal?

A. I rejected his proposal.

Q. Did you ever offer him employment?

A. I have never offered him employment.

Q. When was it determined to terminate Montgomery Brothers representation of the Fenwal line?

A. The exact date of determination probably—we had discussed [179] it for a long, long time, for years, practically every time somebody would come back from the West Coast the matter was discussed because of their displeasure with the situation. As near as I can remember there was a week or ten days before our last directors' meeting there were discussions in our plant between the directors at which the decision was in effect made.

Q. What do you mean the last directors' meeting?

A. The directors' meeting of December prior to the termination. So it would be some time around mid-December that the decision was finally made, although I knew it was in the making for a long time.

Q. Did you consult your Boston counsel about it before you wrote them the letter of December 29, 1948?

A. We did.

Q. Some time before the letter went out?

A. Some time before the letter went out.

Q. And the phrasing of that letter was partly his; is that correct?

(Testimony of John M. Storkerson.)

A. He assisted us with it.

Q. He assisted you in the preparation?

A. Correct.

Q. Mr. Christin asked you about your plans for handling the California business of Fenwal in the event of a termination of Montgomery Brothers, and you stated in reply, I believe, that you thought you would be able to get Mr. Hawkins. Had you [180] any other plans?

A. We certainly did. Mr. Hawkins was only a possibility; one of several. I had discussions of it with Mr. Robinson at our plant, as I recall, and we had talked about this possibility of a man up in the North who was fully capable in the event Hawkins were not selected or did not care to come with us.

Q. Except for his telephone call to you on or about the 31st of December, 1948, to which you had testified, the only time you ever discussed employment with Mr. Hawkins was the night of January 26th at Los Angeles; is that correct?

A. Yes, sir.

Q. Now, with respect to these orders which had been received from Montgomery Brothers prior to the end of the year 1948, were all of the orders that came in up to the end of the year and up through the notice of termination accepted? A. Yes.

Q. And is it also true that all of the orders received during the months of January and February of 1949, that is, during this 60-day termination period, which were for delivery within that 60-day period were accepted? A. Yes.

(Testimony of John M. Storkerson.)

Q. So that the only orders not accepted during that period were those for delivery after the end of the 60-day period? A. Yes, sir.

Q. Then was it those orders which were the subject of discussion [181] between you and the Montgomery Brothers in San Francisco at the end of January, 1949? A. Yes, it was.

Q. Was it the amount of profit which they were to receive upon those orders that you were discussing?

A. That was the profit we were discussing.

Q. As I understand Mr. Christin's interrogation of you on that subject, their claim to profit on those orders was something in the neighborhood of \$36,000 or \$37,000? A. Yes.

Q. Roughly. Now, at the end of that discussion with them in San Francisco what determination had you reached, or did you believe you had reached, with them respecting the allowance of that profit?

A. I believed that I had arrived at an agreement with them under which—on that particular profit, as a matter of fact, there was only a spread of some three or four thousand dollars. The actual arrangement was under the terms of Dr. Walter's letter which came through later, on the basis of—

Q. Wait a minute. What do you mean "There was only a spread of three or four thousand dollars?"

A. We had given them everything, everything that they claimed, except a matter of something like \$4,000.

(Testimony of John M. Storkerson.)

Q. You mean of the thirty-six or thirty-seven thousand dollars they were claiming—— [182]

Mr. Christin: If your Honor please, this is leading. I think the witness understands the question, and he has answered it "There was only a spread of \$3,000."

Q. (By Mr. Doyle): Of the thirty-six or thirty-seven thousand dollars which they were claiming, you thought you had made the arrangement whereby all but three or four thousand dollars of that would be allowed, is that correct? A. Yes, sir.

Q. And that was the arrangement that you speak of referred to in the letter of February 4th from Dr. Walter to Montgomery? A. That is right.

Q. The other question under consideration was the question of their representation under a new contract for the territory north of Los Angeles; is that it? A. Right.

Q. I believe your testimony was that you separated those two things? A. I did, sir.

Q. But that at the Los Angeles meeting with Ray Montgomery he sought to put them together?

A. Yes, sir.

Q. Then your letter of February 9th enclosing a contract was pursuant to the second part of the negotiation, namely the contract for representation in the northern territory?

A. That is right, Mr. Doyle. [183]

Q. Did either of the Montgomery Brothers at any of these meetings you held with them indicate to you in any way whatsoever that they were aware

(Testimony of John M. Storkerson.)

of Fenwal's financial situation? A. They did.

Q. What did they say?

A. One recollection of it was—I mean my recollection of one instance was when Mr. Fred Montgomery, while he visited here in San Francisco in March, talked at great length about the weakness and the very poor financial situation of our company, and at the same time discussing the strength of his own company.

And I also remember something said in regard to—I mean I remember that something was said at the first conference with reference to the same subject, but I couldn't tell you exactly what it was, of the same nature.

Q. With regard to that proposed new contract for the northern territory, did I understand that Montgomery Brothers were insisting that under it they should have the right to buy and to resell as they had had under the old contract?

A. You mean, Mr. Doyle, at the time that I received the letter from them? They were insisting all the time, that they wanted to do that, but I had told them that we absolutely wouldn't consider it.

Q. Your statement was, as I recall it, that it would have to be your usual manufacturers representative arrangement?

A. Exactly the same kind of contract that we had with other representatives [184] throughout the country.

Q. And the old Montgomery contract which had

(Testimony of John M. Storkerson.)

been terminated by the 60-day notice was a unique contract in that respect? A. It was.

Q. Did Dr. Walter's letter of February 4, 1949, in evidence here as Plaintiff's Exhibit 9, express your understanding of the arrangement reached at the first San Francisco meeting with Fred and Ray Montgomery? A. It does.

Q. And is it in accordance with the report you made to him by telephone the evening of that meeting? A. It is in accordance with it.

Q. At your meeting with the Montgomery Brothers at the end of January, I believe you said it was the 26th, do I understand that you told them you were going to see Mr. Hawkins when you got to Los Angeles and make him a proposal? A. I did.

Q. Orally or in writing? A. Orally.

Q. Did he accept it? A. He accepted.

Q. What was the arrangement about when he would go to work for Fenwal?

A. After—he was to go to work for us after his employment date was completed with Montgomery Brothers. He was already on [185] notice.

Q. You mean he had already given notice to Montgomery Brothers?

A. He had given notice about the 15th of the month.

Q. When did he go on the Fenwal payroll?

Mr. Christin: What month, please? The 15th of what month?

A. I think he went on our payroll approximately

(Testimony of John M. Storkerson.)

March 1st, but I'm not sure; I would have to check the records.

Q. (By Mr. Doyle): He went on the Fenwal payroll on March 1, 1949?

A. As I recall; I would have to check.

Q. And your meeting with him at which you reached an understanding in that respect was January 26th? A. Correct.

Q. Then the next morning when you say Ray Montgomery and you went to visit the aircraft companies, you say you told Montgomery that you had hired Hawkins?

A. I either told him or gave him reason to know, because I already told him I was going there for that purpose.

Q. I show you, Mr. Storkerson, a purchase order on Montgomery Brothers purchase order form and direct your attention to the fact that this particular order bears No. 15571 and is addressed to Fenwal, Inc. January 26, 1949, with directions to ship to Boeing Aircraft Company, Seattle, Washington, and ask you whether or not that is the usual purchase order form received in the ordinary course of business by Fenwal from Montgomery Brothers? [186] A. It is. .

Mr. Doyle: I offer the document identified as Plaintiff's Exhibit No. 31.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 31 in evidence.

(The Purchase Order Form referred to was marked Plaintiff's Exhibit 31 in evidence.)

(Testimony of John M. Storkerson.)

PLAINTIFF'S EXHIBIT No. 31

This number must appear on
B/L., shipments and invoices
No. 15571

Purchase Order
Montgomery Brothers
Engineers—Manufacturers—Chemists
1122 Howard Street
San Francisco 3, U. S. A.

Airmail

To: Fenwal Inc.

Date: Jan. 26, 1949

Requisition No.: 9674

Ship To: Boeing Airplane Company
Seattle, Washington

When: At Once—By February 1, 1949

Route: Parcel Post

Number and Mark All Packages.

Mark: #228066-07

Please Enter Our Order for the Following Material. Ship as Directed, Noting Carefully All Instructions and Conditions Given.

This order is placed with the distinct understanding that in the event of prices declining before the time of Shipment, we are to be given the benefit of such lower prices or discount.

We assume price quoted below correct unless notified before shipment.

Goods subject to our inspection, notwithstanding prior payment to obtain cash discount.

(Testimony of John M. Storkerson.)

Goods rejected on account of inferior quality or workmanship will be returned to you with charge for transportation both ways, plus labor, reloading, trucking, etc., and are not to be replaced except upon receipt of written instruction from us.

It is understood that in accepting this order you hereby covenant and agree to defend and save harmless Montgomery Brothers against any and all claims which may be made under the Patent Laws of the United States on account of the manufacture, sale or use of the articles within named and likewise of any other article furnished pursuant thereto.

Quantity

Articles

3

#17401 Fenwal Thermoswitches.

Master

cc. Seattle

Acknowledge and Advise Definite Shipping Date

Terms: Unless you indicate to the contrary on your invoice, we shall discount your bills on the tenth of each month.

No allowance for Boxing or Cartage.

All invoices to be submitted in duplicate direct to San Francisco, together with all shipping papers on day shipment is made.

MONTGOMERY BROTHERS,

Per /s/ T. M. HART.

[Endorsed]: Filed July 12, 1950.

(Testimony of John M. Storkerson.)

Q (By Mr. Doyle): With respect to the question of the non-payment of shipments made during January, when was the fact of non-payment first brought to your attention?

A. About the same time as the arrival of Mr. Montgomery's letter to me.

Q. You mean the letter of February 14th?

A. Right, in which he took exception to the contract arrangement, I had offered him.

Q. In advance of your telegram of February 21st inquiring about the payment?

A. It was a very short time.

Q. That day or the previous day?

A. Yes, that is right.

Mr. Doyle: That is all.

Recross-Examination

By Mr. Christin:

Q. You said that the letter of Dr. Walter of February 4th was in keeping with your conversation with Dr. Walter on the phone. When did you have that conversation with [187] Dr. Walter on the phone?

A. I called Dr. Walter on the phone on the evening of the first night that I was here with regard to the advance in our discussions to that date, and on the evening of the second night that I was there—on the evening of the first night that I was here in San Francisco we had outlined the whole arrangement so that I was prepared on the following date to tell Montgomery Brothers, as I recall, I was able

(Testimony of John M. Storkerson.)

to tell them that the terms looked—that they had offered looked satisfactory to us and were acceptable to me. As I recall, I was told to tell it to them. I told them I was going to phone it directly and entirely in accordance with the information they had given me, and it should be identical with the discussion of that day in Mr. Montgomery's office—should be identical with what exactly is expressed in Dr. Walter's letter.

Q. In that conversation with Dr. Walter did you tell him that Montgomery Brothers were to settle the profit question and also at the same time determine what their rates were to be under the new contract? Did you report to Dr. Walter there were two things under consideration? The settlement of the profit and also the settlement of the new territory. Did you tell that to Dr. Walter on that phone conversation?

A. No, sir, because it wasn't taken up; as a matter of fact, I was going to settle the matter of profits with Montgomery Brothers there and I told them I would write to our office [188] and have Dr. Walter write a letter for their acceptance. As I left San Francisco I told them I would negotiate a contract with them—I would consider the negotiation of a contract with them when I was in Los Angeles. As I recall, I told Mr. Ray Montgomery I was going to submit a contract to them.

Q. Before you left San Francisco didn't they tell you that they wouldn't settle the matter of profit

(Testimony of John M. Storkerson.)

unless they determined in the same transaction on the terms of the new contract?

A. No, sir, because at the time I met Mr. Ray Montgomery at his hotel, I believe the Savoy, in Los Angeles, some weeks later, we had a considerable argument about the fact that he had at that time, as I understood it, departed from his original agreement that he would go along with us on the profits and keep the other separate.

Q. It is your testimony, then, in San Francisco nothing was said about a new contract; you confined your conversations entirely to the settlement of the matter of profits?

A. I didn't say that. We talked about the possibility of negotiating one.

Q. Very well. Did you tell that to Dr. Walter: that Montgomery Brothers were insisting on a new contract before they would settle the profit question? Did you tell that to Dr. Walter in either conversation with him in San Francisco?

A. I didn't.

Mr. Christin: That is all. [189]

The Witness: If I understood the question—I would like to have that again; I want to be sure I understand it.

Q. In that conversation with Dr. Walter before you went to Los Angeles, did you tell Dr. Walter in that conversation that Montgomery Brothers had been discussing with you the matter of the new contract and wouldn't consider a settlement of the profit question unless they had a new contract and the

(Testimony of John M. Storkerson.)

two things ought to be settled in one operation? Did you tell him that in substance?

A. I reported to Dr. Walter in substance that I had—that we had come to a reasonable agreement—we had come to an agreement on the profit question, and that I had told them I would consider the negotiation of a new contract.

Q. You did discuss that with Dr. Walter on the phone?

A. That I told them that I would consider a new contract.

Q. When Dr. Walter sent out the letter of February 4th it only referred to the matter of the settlement of profit and was silent as to the new contract; is that correct?

A. That was my agreement with Montgomery Brothers.

Q. Then in the letter of the 9th he did send a new contract which provided for a new contract so far as territory was concerned?

A. The contract that was submitted on the 9th I submitted as part of the promises when I returned.

Mr. Christin: That is all. [190]

Mr. Doyle: That is all.

The Court: That is all. Get down from there while you can. They are through with you.

The Witness: I'm sorry. Thank you, your Honor.

Mr. Doyle: The Plaintiff rests.

Mr. Christin: Mr. Raymond Montgomery.

W. RAY MONTGOMERY

called for defendant, sworn.

The Clerk: State your name to the Court, please.

A. W. Ray Montgomery.

Direct Examination

By Mr. Christin:

Q. Where do you reside, Mr. Montgomery?

A. 2110 Jackson Street, San Francisco.

Q. Are you in business in San Francisco?

A. I am.

Q. What business are you engaged in?

A. My brother and I are the sole owners of Montgomery Brothers.

Q. How long has that business been in existence?

A. Since about 1920.

Q. And you are the two partners in that business, is that correct?

A. Yes, sir.

Q. What is the nature of that business? What do you do?

A. We are sales representatives for eastern manufacturers, and we manufacture some products ourselves and sell them in the territory which we designate as the territory west of the Rocky [191] mountains, including Alaska and the Orient.

Q. And what articles were you handling as sales representatives in the year 1948?

A. We handled the Edwin L. Wiegand line of electric heating elements.

(Testimony of W. Ray Montgomery.)

Q. What are they?

A. They consisted of a complete line of all kinds of electric heating elements.

Q. Used for what?

A. Used in different appliances, such as service burners for electric ranges, immersion heaters for electric hot water heaters, cartridge units and all different types of electric elements.

Q. What other articles were you handling?

A. We were handling Peerless Electric Account from Warren, Ohio.

Q. Any thermostats?

A. We were handling some thermostats in conjunction with the Edwin L. Wiegand line and a water heater tank thermostat manufactured by the Iron Fireman people of Portland, Oregon.

Q. And at the same time in 1948 you were also handling Fenwal products?

A. Fenwal line, yes, sir.

Q. And these various representations you have referred to, did you handle them on a basis that you would buy at a price from the [192] manufacturer and you would sell to your customers at an increased price?

A. It has always been——

Q. Did you so do? A. We did, yes, sir.

Q. Did you have any of those lines on a commission basis?

A. No, sir.

Q. Where was your business conducted in the year 1948?

A. Our home office is in San Francisco. We have branch offices in Los Angeles, in Portland, Oregon, and in Seattle, Washington.

(Testimony of W. Ray Montgomery.)

Q. And what territory did your business serve?

A. It served all of the territory west of the Rocky Mountains.

Q. What title do you give to the men who are in charge of any local area? What are they?

A. We generally have a local manager, and under these local managers we have sales engineers and also clerical workers, such as girls in the office.

Q. Who was the Sales Manager, Office Manager, in Seattle?

A. In Seattle, Mr. Floyd Doldwin, and in Portland, Mr. Robert M. Harmon.

Q. Where was your office in Seattle?

A. 911 Western Avenue.

Q. In Portland?

A. On Marshall and 15th Street.

Q. And who was the Office Manager in Los Angeles? [193]

A. Mr. Ed Hawkins, in 1948.

Q. Where was the office there?

A. 941 E. 8th Street.

Q. How long had Mr. Hawkins been in your employ?

A. He came with us in the early part of 1935, to the best of my recollection.

Q. And when he came to you what was his position?

A. He was an apprentice in our shop in San Francisco.

Q. Where did he work?

(Testimony of W. Ray Montgomery.)

A. He worked at 61 Fremont Street, which at that time housed our shop.

Q. And what were his duties?

A. His duties were to work in the shop, to do any and all things, to learn as much as he could about the trade that—the business that we were engaged in.

Q. Then did you have him under your personal supervision after he left the shop and engaged in sales?

A. He was under my supervision—personal supervision.

Q. Do you have an engineer in the shop in San Francisco? A. We do.

Q. Who is he? A. Mr. A. D. Conant.

Q. Did you ever train Mr. Hawkins in engineering so far as your engineering problems were concerned before Mr. Hawkins left San Francisco?

A. He worked out of San Francisco first in sales.

Q. Then did he go to Los Angeles?

A. Yes, sir.

Q. In what year?

A. I should say in 1939 or '40; I'm not sure of that particular point.

Q. In what capacity?

A. He came down there as an office clerk.

Q. What were his duties as office clerk?

A. He was handling all the clerical work in the office and assisting in counter sales from the office.

Q. What year did he go down there?

A. I think it was in 1939 or 1940.

(Testimony of W. Ray Montgomery.)

Q. Did you at that time have the Fenwal line?

A. No, sir.

Q. Did he acquaint himself with the selling of your other lines at that time? A. He did.

Q. And did he do a satisfactory job?

A. Yes, sir.

Q. When you took on the Fenwal line in Los Angeles who handled that line?

A. At the time that we took on the Fenwal line Mr. Hawkins handled the line at that time along with other things that we had to sell. [195]

Q. What was the article that was then being purchased by you from Fenwal when you first took it over in 1942?

A. Commercial switches mostly; that is, not aircraft, but commercial switches.

Q. Then when did the aircraft switches come into the picture?

A. The middle, or about the middle of 1942.

Q. Do you know how that was developed?

A. Yes, sir.

Q. Did Mr. Hawkins have anything to do with the development of that switch?

A. Not at the very beginning, but he did after 1942.

Q. In the beginning who first created or caused the work on the airplane switch?

A. I did myself.

Q. Where?

A. The first order I secured was from Boeing Aircraft Company in Seattle, Washington.

(Testimony of W. Ray Montgomery.)

Q. Had they been used on airplanes prior to that time to your knowledge?

A. Not to my knowledge.

Q. Was there a change in pattern or a change in the mechanical construction necessary to apply them to airplanes?

A. At first only modifications of the standard switches. After that it became a question of designing the switch to fit the job.

Q. Who would contact the engineers for Boeing in Seattle? [196]

A. Myself.

Q. Any man up there help you?

A. Mr. Doldwin.

Q. And in Los Angeles who would contact the airplane manufacturers?

A. Myself and Mr. Hawkins.

Q. Did he go with you to the companies?

A. He did.

Q. When you went out there he would go?

A. Yes, sir.

Q. What did he do, so far as you know, to collaborate with the engineers at the airplane companies to change this switch to make it adaptable to airplanes?

A. In the beginning of our handling the Fenwal Switch Mr. Hawkins and I went calling on all of the aircraft companies in Los Angeles. The Lockheed Company was the first company that became interested in using a switch as a unit fire detector.

Q. What do you mean by that?

A. A unit fire detector is a unit thermostat that

(Testimony of W. Ray Montgomery.)

is used in different parts of the airplane, especially in the engines themselves, to record and make contact upon a rise in temperature; the rise in temperature making the contact then lights a light, and the flight engineer is supposed to know then at that time that he has an undue heating problem at that source.

Q. What was done by you and Hawkins to develop that switch? [197]

A. At the beginning of our contacts all we had to sell was standard Fenwal switches, and they were not much interested in doing any special development work.

Q. Who is "they"?

A. Fenwal, in doing any special development work on aircraft switches, so that we applied from our standard switch the switch that seemed best for the application and then made standard modifications as shown in Fenwal's catalog, and——

Q. Were those switches as modified then purchased by the airplane companies?

A. They were purchased first by the Lockheed Company and used in great quantities on the first Constellations that were manufactured.

Q. Did Mr. Hawkins work with you on that problem in Los Angeles?

A. Mr. Hawkins worked not only with me, but in many instances by himself, with the Lockheed engineers.

Q. Do you know whether he took any special courses to familiarize himself with the problem?

(Testimony of W. Ray Montgomery.)

A. He worked very hard knowing that.

Q. As time marched on your business progressed for the selling of switches in Los Angeles?

A. It did, because we then started selling other aircraft manufacturers.

Q. Did anybody else in the Los Angeles area contact the airplane [198] trade than Mr. Hawkins and yourself?

A. We had other men in the office later, but in most instances, all of the contacts for the airplane companies on thermostats or Fenwal products that were to be used in the planes themselves, were handled by Mr. Hawkins. The other men made the contacts with the airplane companies for using standard switches for heat application in process work in the plant.

Q. In your duties with the Montgomery Brothers did you spend much time in Los Angeles?

A. I was forced to spend a great deal of time there.

Q. Did you go to the Northwest too?

A. Yes, sir.

Q. And make trips East during the year?

A. That is right.

Q. And while you were away who handled the Los Angeles Fenwal business?

A. Mr. Hawkins.

Q. Now, in the progress of your work with Fenwal did the business of purchases from Fenwal increase from 1942 to 1948?

A. Yes, sir.

Q. I show you a statement which I think you

(Testimony of W. Ray Montgomery.)

took from your books and ask you if that is the amount of purchases made by your company from Fenwal during the given years?

Mr. Doyle: You are not offering this as an exhibit?

Mr. Christin: No, as a memorandum. With this in hand to refresh [199] your memory, what were the annual purchases for those given years?

A. Shall I read from this?

Q. Yes, please.

A. In 1942 our purchases from the Fenwal Corporation was \$39,876.18. In 1943 our purchases were \$63,077.64. In 1944 our purchases were \$75,636.57. In 1945 our purchases were \$228,609.73. In 1946 our purchases were \$256,169.78. And our purchases in 1947 were \$229,895.00. And our purchases in 1948 were \$266,822.06.

Q. And in the same years what were your sales of articles which you had purchased from Fenwal?

A. Our sales—our billing to the customer in 1942 was \$47,712.91; in 1943, \$80,875.64; in 1944, \$83,950.07; in 1945, \$292,279.79; in 1946, \$347,603.72; in 1947, \$284,258.49; and in 1948 was \$356,920.44.

Q. During those years when the manager there you say was Mr. Hawkins, will you state to me the salaries that were paid Mr. Hawkins from '39 to '48, and bonuses?

A. Mr. Hawkins' salary and bonus in 1939 was \$1,370.39; in 1940 was \$1,660.00; in 1941 was \$2,300.00; in 1942 was \$2,900.00; in 1943 was \$2,900.00; in 1944 was \$2,900; in 1945 was \$6,574.36; in 1946

(Testimony of W. Ray Montgomery.)

was \$10,736.13; in 1947 was \$8,600.00; in 1948 was \$10,250.00, that is the combined salary and bonus.

Q. When was it customary to pay the [200] bonuses?

A. Ordinarily it was given as a Christmas present.

Q. About Christmas time?

A. About Christmas time.

Q. Or after the books were closed?

A. In the case of Mr. Hawkins, for two years it was after the books were closed. Prior to that time it was given as a bonus.

Q. Did you have occasion to go to the Fenwal Company in Ashland from time to time during these years?

A. I made approximately two trips a year, the Spring and the Fall.

Q. To Ashland, Massachusetts?

A. Yes, sir.

Q. Did Mr. Hawkins go on some of those trips?

A. Mr. Hawkins went to the factory, but not on the trips with me.

Q. Do you know how many times approximately he went during those years?

A. To the best of my recollection, once.

Q. Did he go to Kansas City?

A. Mr. Hawkins didn't; I did.

(Thereupon an adjournment was taken until Thursday, July 13, 1950, at 10:00 o'clock [201] a.m.)

Thursday, July 13, 1950, 10:00 o'Clock A.M.

The Clerk: Fenwal Incorporated versus Montgomery Brothers, on trial.

W. RAY MONTGOMERY

called for defendant, resumed the stand.

Direct Examination

(Continued)

By Mr. Christin:

Mr. Doyle, I went to the Clerk's Office this morning about the deposition of Mr. Hawkins. I find it has never been returned. Do you know anything about that?

Mr. Doyle: I know nothing at all about that, Mr. Christin.

Mr. Christin: It was taken and I thought it would be here signed and returned.

Mr. Doyle: It is your deposition; you took it; I don't recall anything having occurred after that time.

Mr. Christin: I think they wrote to you; he was still in your employ; he still is, I suppose, and I thought we would send it to you to have him sign it.

Mr. Doyle: We received no communication with reference to the deposition.

The Court: Where was it?

Mr. Doyle: In San Francisco. Mr. Christin took it at my office.

Mr. Christin: May we use a copy then?

Mr. Doyle: No, I think not; I would insist upon the original.

(Testimony of W. Ray Montgomery.)

Mr. Christin: Is there any way of having the man sent up here? [202]

Mr. Doyle: Well, I don't believe that Hawkins' deposition is admissible in this proceeding. If you wish to call Hawkins, that is your privilege; but the deposition certainly is not admissible in the absence of a showing.

Mr. Christin: The witness isn't here.

The Court: Where is he?

Mr. Christin: Los Angeles.

Mr. Doyle: Have you made any effort to subpoena him?

Mr. Christin: No, because I relied on the deposition.

Mr. Doyle: You can't introduce a deposition of a man whose absence is unexplained.

The Court: How far does the subpoena power extend in a civil case? I don't think it goes to Los Angeles.

Mr. Doyle: We will produce Mr. Hawkins if Mr. Christin wants to examine him.

Mr. Christin: That is almost unnecessary; I only have three or four questions.

The Court: Not giving too much time to this, I will just state the practice I am accustomed to. I think it is a hundred and some miles, if someone lives a hundred and some miles away from the place of holding court as stated in the Federal Rules of Civil Procedure, the deposition may be used——

Mr. Christin: Yes, sir.

The Court: At the choice of the party, even

(Testimony of W. Ray Montgomery.)

though he is within the reach of subpoena [203] power.

Mr. Christin: That is in there. He is more than four hundred miles away.

Mr. Doyle: Mr. Hawkins will be made available for Mr. Christin's use if he wants his testimony.

Mr. Christin: I would like it very much.

Mr. Doyle: If you want to have Mr. Hawkins here, you let me know and I will produce him.

The Court: That will be satisfactory.

Mr. Doyle: When will you want him?

Mr. Christin: I would like to have him this afternoon.

Mr. Doyle: Pardon me, your Honor; I will ask Mr. Storkerson if he can't get him present.

The Court: Lawyers fight more than businessmen.

The Witness: I hope not.

Mr. Christin: We get paid for it.

Q. Mr. Montgomery, you stated that you went East about two or three times a year?

A. Yes, sir.

Q. And you would go to the **Ashland factory?**

A. On all of my eastern trips I would call there.

Q. Were you there in the month of May, 1948?

A. No, sir.

Q. Were you there in the month of October, 1948?

A. In the latter part of September or the first of October, yes, sir. [204]

Q. Did you see Dr. Walter?

A. No, sir.

(Testimony of W. Ray Montgomery.)

Q. Did you see Mr. Storkerson?

A. Yes, sir.

Q. Did you see anybody else of the executives?
Mr. Robinson?

A. Mr. Turrene and at that time I passed the time of day with Mr. Finn.

Q. Who is Mr. Finn as you understand it?

A. He was also a member of the firm.

Q. At any of those conversations with those gentlemen did any of them express to you any dissatisfaction with the manner or way you were handling the representation of the Pacific Coast?

A. No, sir.

Q. Did any of those gentlemen at that time tell you of a conference that was had or a session that was had between Dr. Walter and Mr. Hawkins in Los Angeles in the month of September of that year?

A. No, sir.

Q. At any time while you were handling this account in a representative capacity, was any criticism made to you by any officer of the Fenwal Company criticising your method of representation?

A. No, sir.

Q. When you speak of an order, will you state what is done to [205] get the order?

A. As a specific answer to that question insofar as aircraft is concerned, we were in constant contact with the aircraft manufacturers and as a plane would be developed from the blueprint stage, we would be working with the Engineering Department to have our switches specified as a part of that

(Testimony of W. Ray Montgomery.)

plane. Then after the plane had passed the paper stage or the blueprint stage, if it was deemed advisable by the executives of the airplane company they would build a prototype plane. It was our position then to constantly attempt to see that our switches were approved on that plane, for once we were accepted and used in the specification of the plane, all orders for the plane from any source would then carry the switches that we had had specified. And that constituted the work that we would do prior to receiving an order for aircraft work. That went over a period or sometimes from eight to nine months, or even a year, before we actually got an order.

Q. Would the switch be changed in any form or manner to comply with some particular plane?

A. It could be modified and changed as the development work proceeded, and it was our position to work with the engineers to see if we could assist them in arriving at the proper switch for the proper application.

Q. Who would take care of that detail in that particular instance for your organization in Los Angeles? [206]

A. Mr. Hawkins followed most of it, and I followed it also.

Q. After the order was placed for that particular installation, what would be done by Montgomery Brothers?

A. After we received the order from the airplane company and secured the release shipping

(Testimony of W. Ray Montgomery.)

dates, we would forward our order to the Fenwal Company. Very often we would forward the order without the release dates if the airplane company couldn't give those dates at that time, but they would be sent just as quickly as we received them.

Q. After the order was placed, then I take it an acceptance would be received by you from Fenwal; is that correct? A. Yes, sir.

Q. Then what had to be done after that in order to close that transaction? What did Montgomery Brothers do?

A. There was a matter of servicing the account.

Q. What do you mean by that?

A. It was practically an office employee's job to handle the paper work. If for sake of argument, they would want to change the job around after they had given the release, usually they would send through a change order, either increasing or setting back the date of shipment, or increasing or decreasing the number of switches per shipment, and we would then, upon receipt of that change order, send the change order on our order blank or by way of a letter to the Fenwal factory.

Q. And after all that was done was payment received by you and [207] you made payment to Fenwal?

A. There could be another—if there were any rejections for any reason whatsoever, upon inspection by the airplane companies, we would then have to give them instructions as to what to do with those rejections. Most of the cases we merely had them

(Testimony of W. Ray Montgomery.)

send that to the factory, because in the majority of the cases the only changes that could be made in the switch would have to be made by the factory and not by the field representative.

Q. When were you first advised that this contract was terminated? On December 31st, was that it?

A. Yes, sir.

Q. Is that when you received the termination notice? A. Yes, sir.

Q. Upon receipt of that notice what, if anything, did you do?

A. On receipt of that notice we sent out a copy of the termination notice to our Seattle and Los Angeles offices.

Q. Prior to sending that out did you have any communications or conferences with Mr. Hawkins?

A. No, sir.

Q. When did you speak to Mr. Hawkins about this matter?

A. We received the cancellation notice on the last day of the year, the 31st day of December, 1948, and in 1949, on the first day of the year, that is, working day, which happened to be Monday, January 3rd, I had occasion to call our Los Angeles office, and during my call I asked if Mr. Hawkins was in, and I [208] spoke to him at that time.

Q. On the telephone? A. Yes, sir.

Q. What did he say and what did you say?

Mr. Doyle: Well, just a minute. If your Honor please, I do not see that a conversation between Mr. Montgomery and Mr. Hawkins in January of 1949,

(Testimony of W. Ray Montgomery.)

when Mr. Hawkins was Montgomery's employee——

The Court: Objection sustained.

Mr. Christin: May I be heard? There is testimony, I believe, to the effect that Mr. Storkerson said that—I am wrong on that.

Q. Did you receive a communication from Mr. Hawkins on January the 2nd (showing paper to witness)? A. Yes, sir.

Mr. Christin: I will offer this in evidence and ask that it be marked Defendant's next in order.

Mr. Doyle: Objected to, if your Honor please, to any communication between Mr. Hawkins and Mr. Montgomery and the Montgomery Brothers in January, 1949——

The Court: Of course, I realize the principle in this is the same as the oral discussion you just spoke about. I understand that. These people claim there has been some interference, piracy resorted to. I am disposed to let everything of a documentary nature that has been identified come in. [209]

Mr. Christin: May it be marked?

The Court: Subject to objection.

Mr. Doyle: Subject to objection as to competency, materiality and hearsay.

The Clerk: Defendant's B in evidence.

(The letter of January 2, 1949, Hawkins to Montgomery, was marked Defendant's Exhibit B in evidence.)

(Testimony of W. Ray Montgomery.)

DEFENDANT'S EXHIBIT B

Arcadia, California,
January 2, 1949.

Montgomery Brothers,
1122 Howard Street,
San Francisco 3, California.

Dear Fred and Ray:

This letter will constitute my notice of resignation, from your employ, effective thirty (30) days from this date.

I will leave the matter of the amount time I continue to work, up to the above-mentioned thirty (30) days at your discretion. There are certain introductions, in the territory, to be made—certain details to be wound up—and other matters which should be given as instruction to whoever replaces me. You are aware of this, and because of it I am, therefore, leaving the time limit up to yourselves.

I have not, and will not, announce the fact of my leaving to any customers of the firm until the end of an agreed notice.

Very truly yours,

/s/ EDGAR V. HAWKINS.

Edgar V. Hawkins,
301 San Luis Rey Road,
Arcadia, California.

cc L. A. files.

[Endorsed]: Filed July 13, 1950.

(Testimony of W. Ray Montgomery.)

Mr. Christin (Reading): January 2, 1949. Arcadia, California.

“Montgomery Brothers,
1122 Howard Street,
San Francisco 3, California.

“Dear Fred and Ray:

“This letter will constitute my notice of resignation, from your employ, effective, 30 days from this date.

“I will leave the matter of the amount time I continue to work up to the above-mentioned 30 days and your discretion. There are certain introductions, in the territory, to be made—certain details to be wound up—and other matters which should be given as instruction to whoever replaces me. You are aware of this, and because of it I am, therefore, leaving the time limit up to yourself.

“I have not, and will not, announce the fact of my leaving to any customers of the firm until the end of an agreed notice.

“Very truly yours,

“EDGAR V. HAWKINS.” [210]

Q. Did you receive a letter from Mr. Hawkins on January 4, 1949?

A. Yes, sir, the letter was written on the——

Q. Is this the letter that you refer to?

A. Yes, sir.

Mr. Christin: I offer it in evidence.

Mr. Doyle: The same objection, if the Court please.

(Testimony of W. Ray Montgomery.)

The Court: Admitted subject to objection.

The Clerk: Defendant's Exhibit C in evidence.

(Letter dated January 4, 1949, Hawkins to Montgomery, was marked Defendant's Exhibit C in evidence.)

DEFENDANT'S EXHIBIT C

Arcadia, California,
January 4, 1949.

Dear Fred and Ray:

I was, to say the least, quite surprised to hear from Jack last evening; and more so, to hear what he had to say. I am sorry that my telephone conversation, necessarily brief and constrained, was not better understood or interpreted, by Ray. A certain amount of apparent bitterness might not have occurred if a better understanding of my remarks had been gotten. I realize, further, my brief and rather brusque note did nothing to help the situation. However, my note was written under some personal stress—after all the decision it represented wasn't too easy—and with this in mind, it may not seem so disagreeable. A letter of resignation is not an easy thing to write. I fully realize that my short note was not like me. I'd rather have written full details, at the time, but my thought processes at the time it was written were not conducive to a verbose explanation. Due to a somewhat perverse streak of reasoning, or honesty, call it what you like; I could not, in my mind, commit myself to the decision at

(Testimony of W. Ray Montgomery.)

Defendant's Exhibit C—(Continued)

which I had arrived the day the letter was written without severing our connections—first!

The chronology of the events which have transpired have been given you by Jack, I presume. I see no need to enlarge further on them.

I do wish, however, to enlarge on my telephone conversation with Ray. I believe, that under the shock of the moment, Ray did not either hear, or understand, what I said. I'll try to say here, what I was trying to convey to Ray when I talked to him. First, that I sincerely wished to do the very best job of which I was capable, for Montgomery Brothers, in the time remaining. There are certain important contacts, on other lines, which I should assist whoever takes my place to make. These, especially the utilities, are most important as you know. Both, as to how they are made—and as to who makes them! Poorly expressed as it is, even here, that is my definite wish. To do all I possibly can to make the transition caused by my leaving as smooth as possible.

Second, I expressed a desire to have a talk with Ray as soon as possible after you receive John Storkerson's letter. By this I meant to discuss Montgomery Brother's business, in this territory, with no discussion of Fenwal business. John Storkerson will discuss that. I meant that there were certain things about the above-mentioned transition which I wanted to discuss with Ray, personnel wise, for the ultimate profit of Montgomery Brothers. I expressed myself, briefly, to Jack on this—and this

(Testimony of W. Ray Montgomery.)

Defendant's Exhibit C—(Continued)

is the discussion I wished to have with Ray. In other words, to work out the best possible procedure for the handling of these other lines for the ultimate profit of Montgomery Brothers—when I am no longer handling them. I feel, strongly, that a discussion of “pegs and holes” is in order.

My only wish, in this telephone conversation, was to convey to Ray a desire to make every minute of the remaining time count as much as possible for the organization. It can be worked out that way, and it should be worked out that way! It would be definitely unprofitable to all concerned to work it out any other way.

Frankly, I want this separation to be as amicable as possible. It can be mutually very profitable. I do not want to leave a bad taste in your mouth—and I am just as anxious to have my own mouth sweet! I do not feel that it is necessary for me to write a justification of my actions. It was my decision, and I intend to live with it. I am sorry that I couldn't have asked, and received, your council. I respect it, and respect you both—but this was not a decision which could be made in that manner. If you will sit down, calmly, and consider the following facts you will, I trust, agree with the thought expressed in the first line of this paragraph—it can be mutually profitable. Fenwal have arrived at the decision that they are no longer willing to continue as they have, and want their own office on the Coast. The reasons behind this decision are known to you, and to Fenwal,

(Testimony of W. Ray Montgomery.)

Defendant's Exhibit C—(Continued)

and I do not enter into this phase of it at all. However, in our reasoning, accept this fact—and the loss of gross volume it entails. With this loss of volume, throw into the balance on the other side, my relatively high overhead, which under the conditions would be a liability. The balance sinks unfavorably (unprofitably) under these conditions. Now, remove my overhead. The balance moves closer to even. Then, to move the balance so that it sinks to the favorable (profitable) side please consider the good I can do the organization in my new activity. I'll cover places you don't—that's a definite certainty. I'll see people you won't, it can't happen otherwise. Please consider that Thermoswitches and heaters go together. I, certainly, will be throwing business your way—with no capital outlay on your part for this business. I fully intend to be as helpful to your organization as possible, in this new venture; and I am sure that Fenwal concur in this. I do not think that this aspect of the situation has been given any thought, to date. I respectfully recommend that it receive some.

In line with my expressed wish to be helpful, I called with Al, on Bauer today. Al is writing his own report. I will add, only briefly, to what he will say. When all the talking (and there was plenty) was over and done I felt in my mind that no definite conclusion had been reached. Therefore, I took the liberty of asking Bill Bauer the direct question as to whether we were "in or out." Bill re-

(Testimony of W. Ray Montgomery.)

Defendant's Exhibit C—(Continued)

plied, "You'll continue to get orders." You can interpret this almost any way you wish, knowing Bauer. From conversations Herman has had with the young lady who handles their stock control it is apparent they are out of 1000W elements, or at least dangerously low. We did not receive an order for this size, in spite of almost a direct request for it. I'd judge that Bauer is still our account. However, don't underestimate the account. Purdy is gunning, for what reason I don't know. Frankly, the way it will have to be handled in my opinion, is to go Purdy's way—"hell for cheap"—and finally set him up in assembling them at this point. While at first, this may not seem a good idea, I believe if you will consider the ease which Wiegand can manufacture and ship tubes only, and the heat which is generally put on by this customer for deliveries without any lead time, it may be the best way to do it. Further, it will simplify the problem of storage, and handling, of the buffer stock it is evident will be necessary. The freight saving, on tubes alone, is not inconsiderable from Bauer's standpoint. I know that the argument regarding laying ourselves open to competition will arise when we talk tubes only. May I remind you that this vulnerability has already been established by Cutler-Hammer, with a flange attached? In fact, I might say—amply demonstrated. I say, again, everything being equal the account ought to remain with Montgomery Brothers.

(Testimony of W. Ray Montgomery.)

Defendant's Exhibit C—(Continued)

I find only one other thing to add. This is important. Imagine the four of us in conference, and then imagine the following events. Bill Bauer pointedly looking at his watch—(indicating not inconsiderable lapse of time) then asking me what time it was, after looking at his watch again, pointedly—then, finally, announcing he had a conference with someone else coming up—(still denoting a considerable lapse of time). I got up and put on my overcoat to break it up, finally!

I, also, called with Al on Mr. Lambert at Rheem to discuss Solo Valves with which Al is not familiar. I will send you a discussion on this, through regular, office, channels tomorrow. Al seemed to be quite well acquainted here, and due to the fact he knew nothing about what was going on, didn't talk.

I had not intended, when starting this letter, to put in the above remarks, preferring to reserve them for discussion, personally, with Ray. However I think you should both be acquainted with the facts and discuss them before a personal discussion with me. Al needs training—a lot of it! He can't, or won't take it from me. I have sold him, today, under the guise of the necessity of getting Herman out of the office more, the idea of Herman meeting the persons we deal with in the San Diego area. Frankly, I feel this is the only course. Further, using the same persuasion, conveyed the same idea about the utilities, and the water softener ac-

(Testimony of W. Ray Montgomery.)

Defendant's Exhibit C—(Continued)

counts, other than Rheem. I do not know whether you will concur in this; but it is my considered opinion that this is the only course of action which will return a profit in the long run. I have wanted to discuss this, before, but under the conditions he was hired, and instructed, could not do so. Again, I feel a discussion of "pegs and holes" is definitely in order.

You will receive, in tomorrow's mail, aircraft orders closed by me today which amount to slightly in excess of \$11,000.00. These, as far as I know, wind up the immediate business from this source. One of these orders will have some rather peculiar notes regarding pricing—due to quantity schedule. I will dictate a letter to files instructing signature of the acknowledgment be held up until this is clarified and an understanding arrived at. The order is valid, and should be entered for production immediately. In fact, you might say all the hazard of any possible misunderstanding is removed due to the fact that initial shipments, at least, will have to be stolen from other orders anyway. Because of this, there can be no hitch, on this pricing matter.

I guess that about winds it up, for now. The only thought, or thoughts, I want to leave are those of a continuing, friendly, relation between us. It will be good for us.

Very truly yours,

/s/ EDGAR.

(Testimony of W. Ray Montgomery.)

Defendant's Exhibit C—(Continued)

P. S. You might tell Jack that crack he made about "misspelled" is wrong. Mis-typed, I can spell "introductions."

Received January 6, 1949.

[Endorsed]: Filed July 13, 1950.

Mr. Christin: It will be deemed to be read at this time.

Q. Did you go to Los Angeles shortly after the receipt of that letter? A. Yes, sir.

Q. While in Los Angeles did you see Mr. Hawkins? A. Yes, sir.

Q. Did you have any conversation with him pertaining to his resignation? Yes or no.

A. Yes, sir.

Q. What were those conversations, who was present, and where did they take place?

Mr. Doyle: The same objection.

The Court: Objection sustained.

Q. (By Mr. Christin): You came back to San Francisco? [211] A. Yes, sir.

Q. And on about the 24th of January, pursuant to telegrams exchanged between you and Storkerson, you met Storkerson at your office on the 24th of January? A. Yes, sir.

Q. Who was present?

A. My brother, Mr. Storkerson and myself.

(Testimony of W. Ray Montgomery.)

Q. State what was said at that time and place by all of you, as you now remember it.

A. When Mr. Storkerson arrived at our office my brother and I were in Mr. F. H. Montgomery's office, and after the usual "Good morning" I asked Mr. Storkerson what in the world this cancellation thing was all about and why we hadn't received an answer to our letter of January 7th written to Dr. Walter. Mr. Storkerson replied that he had brought the letter—the answer to our letter with him, and thereupon gave me the letter to read, which I did. After reading it, I handed it to my brother and waited until he had read it thoroughly. And then I said to Mr. Storkerson, "John, this letter is not based upon facts. How in the world could Dr. Walter say that our representation was not satisfactory, since when we took your account in 1942, you had practically no business out here, and we have built it up to a sizeable business of many thousands of dollars per year? That, John, is not the real reason for the cancellation. Won't you tell me the real reason?" [212]

And he said that that was, as near as he knew, the reason.

I said, "If you can't tell me the reason, I can tell you the reason. The very fact that you have taken our man, Hawkins, who had the contacts with the aircraft companies in the South and that you laid the foundation for taking this man as far back as September—you thought that it would be the easy

(Testimony of W. Ray Montgomery.)

way to take Montgomery Brothers' profit on business that we had built up, for you, for certainly you had no business before we constituted the business for you."

He said, "Ray, I am not here to fight; I am here to make a satisfactory settlement of the termination of our business relations."

So I said, "All right, John, what have you to offer in the way of settlement?"

He said, "We think that it would be satisfactory to ship all the orders we can during the termination months, which are January and February, then you turn the orders over to us after that time and we will start to bill on those orders."

And I said, "John, I don't think that that is fair, for certainly we have done exactly the same amount of work bringing these up to the order. Remember, when we receive the order that is merely the result of the many months work that we had put in with the company to get the order, and the orders that we are going to submit to you and have submitted between the 1st of January and the time that you are here are identically the same [213] as all the orders we have been sending prior to that time; that is, identically the same in this respect: that the methods of procedure of securing them were the same."

He offered an argument at that time that they would then, after they would take on the orders that we had and would send them, that they would have to do the service work.

(Testimony of W. Ray Montgomery.)

And I said, "John, in our answer to the receipt of the termination of our contract, we stated that we expected all profit on the orders that we submitted to you regardless of the date of shipment, for that was the procedure that we had done on all the orders prior to the time of termination, and that if there was any service work to be done on the order after we had received it and they had made shipment, we stood willing and ready at all times to do that service work, the same as we had done on all the orders previous to that."

We argued backward and forward as to the advisability of that. And then he asked me what I thought would be a fair settlement.

And I said, "John, before I answer that question, I will ask you a question: 'What are you going to do in the balance of the territory except the aircraft industry in the South that you are placing your own office in to service?' "

And he told me at that time that they had made no provisions.

I said, "All right, if that is the case, you certainly cannot [214] hope to have Mr. Hawkins handle all the territory that it has taken our entire organization to handle."

He said, "No, that is true, but we will have other men besides Hawkins."

I said, "Regardless—how many men are you going to have?"

He said, "We will possibly have two men, Hawkins and another engineer."

(Testimony of W. Ray Montgomery.)

I said, "They can't do it either."

He agreed with that, that they wouldn't be able to cover the same territory that we have with our entire organization. Therefore, I said, "If you will consider allowing us to handle the balance of the territory on exactly the same basis that we have been handling it previously, or to the time of cancellation, I think that that would be the basis of an argument of how we are going to handle the orders that we have now and the orders that we will receive.

Came about lunch time then, and we hadn't arrived at any decision, and shortly after lunch I offered the suggestion that he allow Mr. F. H. Montgomery and I to consult and then we would see if we could give him a proposal that would be satisfactory to us for the termination of the contract or the termination orders.

In the afternoon, when he returned to our office, I told him that if he would give us a contract, or, in other words, reinstate the contract that we had on exactly the same terms, deleting from the contract the aircraft industry in the South— [215] the aircraft industry—I would be willing to forego 50 per cent of the profit that we would have made on the shipments of any orders that we might take, or that we had—that we might take during the time between the first of January and the last of March, it being understood—he had told me previously that they were willing to pay us for all of the orders that

(Testimony of W. Ray Montgomery.)

they had sent acknowledgments for, which were the orders prior to the time of the cancellation.

He said that he was not in a position to offer such, or to give us an assurance on that, but that he would take the matter up with his principals, since he had been sent out here to make the settlement of the orders that we were receiving and would be receiving up to the end of the contract.

That consummated about the first day's conference.

The next morning when he arrived at our office, I asked him, "John, are you in a position to accept the proposition that I made?"

He said, "No, but I have transmitted it to Ashland, and I think that something can be worked out."

"Well," I said, "What do you feel? Do you think that it is fair? Because if you think it is fair, we have a pretty good chance of getting the matter settled at this time."

He said, "I can tell you and Fred both at this time that I have never yet made a recommendation to the Fenwal Company that has not been [216] accepted."

"Well, I said, "Upon the assurance that you are in favor of this, I think that the settlement can be made along the lines of our suggestion."

He then suggested that I go down to Los Angeles or meet him there, and we together call on the aircraft industry and acquaint them with the fact of

(Testimony of W. Ray Montgomery.)

this transition between Montgomery Brothers and Fenwal, and I agreed to do so.

And that just about ended the conversation in San Francisco on January 25th.

Q. Did he in that conversation state to you that he had made the appointment to meet Hawkins that night—the next night in Los Angeles?

A. He did not.

Q. Did you go to Los Angeles?

A. Yes, sir.

Q. Did you meet Mr. Storkerson in Los Angeles?

A. I met Mr. Storkerson in Los Angeles in our office.

Q. And who was present?

A. On the morning of January 27th. Mr. Hawkins, Mr. Storkerson and myself. The other employees were there, but they were not in the private office that we were in.

Q. What was said as you now recall it by the three of you?

A. The first thing I did after saying “Good morning” was to tell Mr. Hawkins that I wanted to bring him up to date, to exactly what had transpired during our meeting in San Francisco, and I [217] reiterated the proposition that we had offered to Mr. Storkerson, which was the reason that I was down there.

And Mr. Hawkins said to me that he was very glad that such a settlement had been made.

And I corrected him by saying that that was not

(Testimony of W. Ray Montgomery.)

a settlement; that Mr. Storkerson had agreed to put this before his principals in Ashland and had assured both Fred and myself that anything he put up to them would be accepted.

Then I told Mr. Hawkins that he possibly knew the reason for Mr. Storkerson and I being there was to make a call on all the aircraft industry to tell them of the transition and to explain to them the mechanics of how they were to handle—how the business was to be handled during this termination period; and it was decided that we would make a call on all the aircraft industry.

Q. And that conversation that day did Mr. Storkerson or Mr. Hawkins refer to the fact that Hawkins and Storkerson had met and been together the night before? Yes or no.

A. Yes, sir.

Q. What did they say?

A. I asked them about why they looked so sleepy, and they said they had spent most of the night together.

Q. Did they then state in your presence what they had discussed together the night before?

A. They were discussing the idea of Mr. Hawkins—— [218]

Q. Who said that? What was said?

A. They told me that Mr. Hawkins was going to be the manager at the new office that would be opened by Fenwal in Los Angeles.

Q. On that day did you proceed, the three of you, to call on the aircraft industry in the Los Angeles area?

A. Yes.

(Testimony of W. Ray Montgomery.)

Q. Where did you go?

A. We went to the Douglas Aircraft Company.

Q. Were all the conversations substantially the same at each place you went?

A. They were practically the same with but one exception.

Q. To save time, in substance what was said at each of the plants, and tell us what plants you went to.

A. We went to the Douglas Aircraft Company on the afternoon of January 27th and talked to the head purchasing agent and the buyer of the Fenwal equipment.

Q. Who was he?

A. Mr. Ferguson was the buyer and Mr. Doran was the purchasing agent.

Q. And who was present?

A. And Mr. Hawkins, Mr. Storkerson and myself.

Q. State what was said at that conference as you now recall it.

A. I told Mr. Doran that the reason that we were there was to apprise him of the fact that after March the 1st the Fenwal Company [219] was placing their own factory office, factory branch, in Los Angeles, and that Mr. Hawkins would be their Manager, and that we had come there to tell him that during the time between now and the 1st of March he was to place all orders that he had to give for Fenwal products in the usual manner with Montgomery Brothers, and thereafter he was to—

(Testimony of W. Ray Montgomery.)

he would deal directly with the Fenwal Company and not with Montgomery Brothers.

He asked Mr. Storkerson if that was his understanding, and Mr. Storkerson said it was. He also said that the reason that they were doing that was because they thought they would be able to get better service by factory supervision trained engineers than we had been able to give.

And Mr. Doran said, "I have had no occasion to complain of the service that you have given up to date."

Q. Now tell us where you went. Was that the only call you made that day?

A. That was the only call we made on the afternoon of January the 27th.

Q. And did you three meet the next morning again, the 28th?

A. Yes, sir; and we went to the North American Company—to the Northrup Company, where we repeated nearly verbatim the same thing that we had told to Douglas. Then it became lunch time, and after lunch we went to the Lockheed Company, Lockheed being one of our largest customers. [220]

Q. And whom did you meet there?

A. We talked to Mr. McChesney, who was the head of the Division of Purchasing, in the Purchasing Department buying our equipment, and Mr. Nick Rachardi, who was the actual buyer of Fenwal equipment. Mr. Hawkins, Mr. Storkerson and myself were present with these gentlemen, in Mr. McChesney's office.

(Testimony of W. Ray Montgomery.)

Q. And in substance the same conversation was had there as had at the other aircraft manufacturing plants?

A. Almost verbatim, and after Mr. McChesney had heard our story and we talked with Mr.—and had had Mr. Storkerson acquiesce about the mechanics of the procedure, he said, “Ray, there is one question I would like to ask.”

Q. Who said this?

A. Mr. McChesney. He said, “There is one question I would like to ask you. How do you feel about this entire proposition?”

I said, “Mac, how would you feel if a company were to take—were to cancel your contract when you had developed all of their business in aircraft on the Pacific Coast? Besides that they had taken our man so that they could carry on contacts that we had paid to get.”

He said, “Ray, I just wanted to get your answer.”

Q. Now then, after your conference at the aircraft manufacturers, did you have another conference or any more conferences with Mr. Storkerson and Mr. Hawkins?

A. Yes, sir, on the morning of the 29th, which was Sunday morning, [221] I invited them to have breakfast with me at the Biltmore Hotel.

Q. And who was there?

A. Mr. Hawkins and Mr. Storkerson.

Q. And did you have a conference there and did you adjourn to a room later?

(Testimony of W. Ray Montgomery.)

A. After talking over the breakfast table, we returned to my room in the Savoy Hotel, which is directly across the street.

Q. The three of you?

A. The three of us, yes, sir.

Q. What was the conversation as you now recall it?

A. I suggested that insofar as Boeing Aircraft Company was located in Seattle and that Fenwal were going to have their office located in San Francisco, and that we still had a trained employee in the Seattle office of Montgomery Brothers equally as capable of contacting the aircraft industry as Mr. Hawkins, that I thought we should amend the suggestion that we gave in San Francisco to include our handling the Boeing account in Seattle. And after a morning's discussion it was generally agreed that that would be a good thing. So that after that meeting Mr. Storkerson was to return to Ashland to put before his principals the proposal that we had given him in San Francisco; and I had offered the change to include the Boeing Company in Los Angeles.

Q. Boeing isn't in Los Angeles. [222]

A. I offered the change that we take the Boeing Company's business and handle it.

Q. Did you have any other conferences with Mr. Storkerson in Los Angeles on that trip?

A. No, sir.

Q. Then you came back to San Francisco or stayed down there?

(Testimony of W. Ray Montgomery.)

A. I stayed down there to contact all the customers that we had to solicit the business that we could get.

Q. Then did you receive a letter from the Fenwal people dated February 4th in San Francisco?

A. Yes, sir.

Q. Is this the letter you refer to (showing paper to witness)?

A. Yes, sir.

Q. That letter indicates, as I take it, a reference to an arrangement for the determination of the adjustment of the profits, is that correct?

A. Yes, sir.

Q. And there is no reference in that letter, I take it, to any territory for Montgomery Brothers?

A. No, sir.

Q. Did you answer that letter?

A. Yes, sir.

Q. Do you remember the date of that letter?

Mr. Doyle: Plaintiff's Exhibit 11, Mr. Christin.

Q. (By Mr. Christin): Is this your reply (showing paper to witness)? [223]

A. Yes, sir.

Q. I call your attention to the fact that it states in the last paragraph on Page 2:

"On the sale at net prices to the Boeing Airplane Company on special thermoswitches or other items, whether or not in the manufacturer's catalog, the orders are to be taken in the name of the manufacturer and the sales representative is to receive a commission of 15 per cent payable as provided in Article 6."

(Testimony of W. Ray Montgomery.)

That referred to transactions being held with the Boeing people, is that correct?

A. That is correct.

May I go back to the—when Mr. Storkerson agreed to the entire proposition being put up to his principals—when he left Los Angeles it had been agreed between Mr. Storkerson and myself that on that one account, the Boeing account, they would deviate from our regular agreement or contract insofar as they insisted that all of the orders from Boeing be taken in the name of the Fenwal Company and forwarded by Montgomery Brothers directly to the Fenwal Company rather than being sent to San Francisco and our order being transmitted to them.

Q. But as to the orders from other areas they were to be on the old form?

A. Exactly the same as the contract had been in force up to the cancellation. [224]

Q. On February 14th you then received a letter from Fenwal, did you not? Is that it (showing paper to witness)?

A. Yes, sir.

Q. And that contained a draft of contract, did it not?

A. Yes, sir.

Q. And you read that contract?

A. Yes, sir.

Q. And that contract covered what territory?

A. It covered all the territory that we had previously had with the exception of Southern California, Los Angeles area.

Q. And did it provide on the handling of the

(Testimony of W. Ray Montgomery.)

business that all business would be on a new system, to wit: on a commission basis?

Mr. Doyle: If Your Honor please, I submit there is no evidentiary value in rehashing documents that are in evidence.

Mr. Christin: Very well; I will withdraw the question.

Mr. Doyle: It is quite clear that letters of February 4th and February 9th were sent and the reply of February 14 was sent.

Mr. Christin: I withdraw the question.

Mr. Doyle: They speak for themselves.

Mr. Christin: Yes, sir.

Q. Did you then answer that letter by sending a letter of February 15th? A. Yes, sir. [225]

Q. Did you ever get a reply to that letter from Fenwal? A. I don't think so.

Q. After February 13th there was an exchange of telegrams; is that correct? A. Yes, sir.

Q. Did you see Mr. Storkerson again until after the 1st of March? A. No, sir.

Q. Other than the telegrams here with reference to payment of the January and February accounts, did you have any other demand from them for payment other than expressed in those telegrams?

Mr. Doyle: What is that?

Q. (By Mr. Christin): Were you ever told by Fenwal or any of its representatives that your failure to pay one invoice or one statement would cause them to desist and discontinue business? Did anybody ever tell you that?

(Testimony of W. Ray Montgomery.)

Mr. Doyle: Objected to as incompetent, irrelevant and immaterial. What was said with reference to what non-payment would result in is unimportant. The documents in evidence speak for themselves. They call for the payment, and the exchange of telegrams speaks for itself.

The Court: He may answer subject to the objection. Answer the question.

The Witness: Will you read the question again, please?

(The Reporter read the question.) [226]

A. No, sir.

Q. Did you meet Mr. Storkerson in Los Angeles after the 1st of March? A. Yes, sir.

Q. When and where?

A. My first meeting with Mr. Storkerson in the early part of March was in the office of Mr. McChesney in the Lockheed Corporation at Burbank.

Q. That was the first time you met him after you had seen him on about the 28th of January, is that correct? A. Yes, sir.

Q. What was said at that conference at the aircraft manufacturing company?

A. Mr. McChesney on the afternoon before the morning that I was there had phoned to ask me to come out, and it was too late for me to get out there.

Q. You got out there?

A. I got out there the next morning, and talked with Mr. McChesney, and he wanted to know——

(Testimony of W. Ray Montgomery.)

Q. Just a moment. Was Mr. Storkerson there at that conversation? A. No, sir.

Q. Don't go into that. Did you see Mr. Storkerson and Mr. McChesney and Mr. Hawkins that day?

A. I saw Mr. Storkerson before I saw he and McChesney together. [227]

Q. Tell us the conversation between you and Mr. Storkerson.

A. He wanted to know from me how we would handle, or on what I would agree to do to handle the Lockheed business and all the aircraft business, and I told him that we would be very glad to assign all of our orders.

The Court: If you are going to leave early, we will take the recess now.

(Recess.)

Q. (By Mr. Christin): Tell us again the conversation about the assignments at Lockheed.

A. Mr. Storkerson and I talked about how they could continue to ship the aircraft companies, and I told him that we would be agreeable to assigning the orders that we had in their favor.

Q. And had he asked for an assignment prior to that time? A. No, sir.

Q. That was the first time he asked?

A. Yes, sir.

Q. You conceded it immediately?

A. Yes, sir.

Q. The assignments were prepared?

A. Yes, sir.

Q. And in those assignments it is provided that

(Testimony of W. Ray Montgomery.)

in the event of cancellations you would be notified?

A. Yes, sir.

Q. You were notified of it being cancelled? [228]

A. Yes, sir.

Q. And that decreases the amount of your claim here?

A. Yes, sir.

Q. You are willing to stand by that deduction from these articles that you sold, these patented switches?

A. Yes, sir.

Q. You knew they were patented through representation of Fenwal?

A. Yes, sir.

Q. Was there any other switch that you know in 1948 that could be used in lieu, in place of it, satisfactorily with the airplane companies?

A. None had been satisfactory. We practically had a monopoly on that business insofar as the switches themselves were concerned for unit fire detectors and for overheating switches.

Q. Did the Civil Aeronautics Commission have any control over the use of those installations?

A. Not the Civil Aeronautics; Wright Field had quite a little bit to do with it, and we had our fire detector approved by Wright Field.

Q. What is Wright Field?

A. Wright Field is the clearing house for all of the Armed Services planes. That is, the equipment to be used on all the planes by the Armed Services in all branches.

Q. At the time of the termination of your contract did you know [229] of any switch or switches that you could purchase to fill the requirements

(Testimony of W. Ray Montgomery.)

of the aircraft manufacturers so far as thermo-static controls were concerned? A. No, sir.

Mr. Christin: That is all.

Cross-Examination

By Mr. Doyle:

Q. Do you know how many patents there are on the various Fenwal switches?

A. I know there are several, but I don't know just how many or other than that they were patented, because nearly all the switches had that mark in the entire catalog, and also on the switches.

Q. You are familiar with the catalog?

A. Yes, sir.

Q. Do you know whose names those patents are in?

A. I have no way of knowing, but I——

Q. You understood or had heard they were in the name of W. J. Turrene, did you not, Mr. Montgomery?

A. I know that—I understood that Fenwal was working under the patents that appeared on the switch and also in their literature.

Q. And that Mr. Turrene of that company held those patents?

A. I knew that, yes, sir.

Q. None of those patents were held by you?

A. No, sir. [230]

Q. Or by Montgomery Brothers?

A. No, sir.

Q. That was true of the aircraft switches as

(Testimony of W. Ray Montgomery.)

well as the other type which you described for us here as industrial switches?

A. That is right.

Q. You say, as I recall your testimony, that you pioneered or pioneered the engineering of the aircraft switch. What did you mean by that?

A. Insofar as the unit fire detector is concerned, in working with the——

Q. Before you go ahead, as far as the unit fire detector was concerned, when was it that you started your pioneering on that?

A. I should say in approximately the year of 1944.

Q. 1944? A. Yes, sir.

Q. About what month?

A. I don't know exactly, but I would say possibly around the middle of the year.

Q. That was done by you personally, Mr. Montgomery? A. And by Mr. Hawkins.

Q. You and Mr. Hawkins?

A. And the engineers of the Lockheed Company.

Q. What month was that again?

A. I would say around the middle of the year 1944.

Q. About midyear 1944. Do I understand that prior to that time [231] there had not been any use of the unit fire detector in aircraft, so far as you know? A. Not to my knowledge.

Q. And it is your understanding that there was no use of the unit fire detector in aircraft prior to that time? A. That there was no use?

(Testimony of W. Ray Montgomery.)

A. No, "Acknowledge and advise definite shipping date."

Q. Now then, read the printed material on the right-hand below that.

A. On the right-hand below that?

Q. Yes.

A. You mean the left-hand, but I will read it.

Q. The left-hand; I beg your pardon.

A. "Unless you indicate to the contrary on your invoice, we shall discount your bills on the 10th of each month. No allowance for boxing or cartage.

"All invoices to be submitted in duplicate direct to San Francisco, together with all shipping business on day shipment is made."

Q. That is your order form, is it not? [234]

A. That is our order form.

Q. I show you two documents, your counsel has handed to me, Mr. Montgomery, and ask that you examine first this one (handing document to witness). A. Yes, sir.

Q. And I direct your attention that it says on its face, "Received, Montgomery Brothers, San Francisco, February 7, 1949," and ask if that is your receipt stamp? A. Yes, sir.

Q. Of your office? A. Yes, sir.

Mr. Doyle: I will request that the document identified be marked Plaintiff's Exhibit 32 and offer it in evidence.

The Clerk: Plaintiff's Exhibit 32 in evidence.

(Fenwal Statement referred to was marked Plaintiff's Exhibit No. 32 in evidence.)

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PLAINTIFF'S EXHIBIT NO. 32

STATEMENT

135-



FENWAL INCORPORATED
ASHLAND, MASSACHUSETTS

THERMOSWITCHES

Montgomery Brothers
1122 Howard Street
San Francisco, California

RECEIVED
MONTGOMERY BROTHERS
SAN FRANCISCO
FEB 7 - 1949

TERMS
1/10, N/30

W.R.M. ACCT. SEATTLE
A.B.C. SALES PORTLAND
F.H.M. FACTY LOS ANGELES
NOTED

ITEMIZED INVOICES WERE FURNISHED YOU WITH THE MERCHANDISE

DATE	FOLIO	DESCRIPTION	CHARGE	CREDIT	BALANCE
1-27-49	9-774		9.26		
1-27-49	9-775		9.39		
1-28-49	9-813		N/C		
1-28-49	9-815		17.36		
1-28-49	9-816		255.00		
1-28-49	9-817		N/C		
1-28-49	9-818		29.40		
1-28-49	9-819		24.81		
1-28-49	9-820		8.13		
1-28-49	9-821		23.75		
1-28-49	9-822		496.16		
1-28-49	9-823		478.56		
1-28-49	9-824		304.94		
1-29-49	9-874		249.97		
1-29-49	9-875		199.52		
1-29-49	9-876		336.60		
1-29-49	9-877		22.03		
1-31-49	9-907		N/C		
1-31-49	9-908		2890.00		
1-31-49	9-909		2890.00		30,309.84
		Total Debits	61.92		
		" Credits		12.23	
		" Invoices	30309.34		
		Total Am't. Due			30,359.53

[Endorsed]: Filed July 13, 1950.

(1)

(Testimony of W. Ray Montgomery.)

Q. I direct your attention next to the statement on the letterhead of Fenwal, Incorporated, consisting of six pages, and ask you if you identify that document as having been received on or about the date of the receipt stamp from Fenwal?

A. Yes, sir.

Q. I direct your attention to the fact that this statement bears, "Received, Montgomery Brothers, San Francisco, March 7, 1949," stamped on its face?

A. Yes, sir. [235]

Q. That indicates it was received at your office at that time? A. It does.

Mr. Doyle: This document identified is offered as Plaintiff's Exhibit 33.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit 33 in evidence.

(March Statement of Fenwal was marked Plaintiff's Exhibit No. 33 in evidence.)

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PLAINTIFF'S EXHIBIT NO. 33

STATEMENT



FENWAL INCORPORATED

ASHLAND, MASSACHUSETTS

THERMOSWITCHES

TERMS
XXXXXX

Montgomery Brothers
1122 Howard Street
San Francisco, California

ITEMIZED INVOICES WERE FURNISHED YOU WITH THE MERCHANDISE

DATE	FOLIO	DESCRIPTION	CHARGE	CREDIT	BALANCE
		Total Debits	61.92		
		" Credits		91.35	
		" Invoices	48,128.04		
		Total Am't. Due			48,098.61

48098.61
46422.49
RECEIVED
MONTGOMERY BROTHERS
SAN FRANCISCO
MAR 7 - 1949
V.M.M. ACCT. SEATTLE
A.B.C. SALES PORTLAND
F.H.M. FACTY. LOS ANGELES
NOTED

[Endorsed]: Filed July 13, 1940.

(Testimony of W. Ray Montgomery.)

Q. Who had the representation of the Fenwal line out here before you took it over?

A. I think they had two representatives—Braun-Knecht-Heimann in San Francisco.

Q. Would you spell that please?

A. B-r-a-u-n K-n-e-c-h-t H-e-y-m-a-n.

Q. They are manufacturers' representatives?

A. No, sir, they are jobbers of laboratory supplies, and their subsidiary in Los Angeles is Braun Corporation. A similar type of business. The representation in the Northwest was held by a manufacturers' representative; I'm not sure, but I think it was Northwest Scientific Company.

Q. It is your understanding that those representations were terminated when the line was placed with you in 1942?

A. I don't know whether they were terminated or not; I know that we were given the—

Q. You acted for Fenwal in this territory after 1942? [236]

A. Right.

Q. And those people had acted for them previously?

A. That is right.

Q. As I understand it, however, Mr. Montgomery, you for many years had the representation of the Wiegand Electric Company of electric heaters?

A. Since about 1931.

Q. And isn't it a fact that the Wiegand people for many years prior to 1942 stocked the Fenwal Thermoswitch?

A. Not many years, no, sir; for a few years.

Q. You had, however, handled the Fenwal

(Testimony of W. Ray Montgomery.)

Thermoswitch as a Wiegand item? A. Yes.

Q. And you still do handle the Fenwal Thermo-switch as a Wiegand item today?

A. Yes. Wiegand buys the standard switches only.

Q. What other concerns do you represent in this territory besides Wiegand?

A. I represent the Iron Fireman of Portland, Oregon, on a tank thermostat used in electric water heaters. I represent the Electric Controls Company of Portland, Oregon.

Q. I was interested in the eastern companies.

A. You understand we are a Coast concern and we handle both coast products and we give them preference all we can; at the same time handled the products of the Arcless Switch Company [237] of Watertown, Massachusetts; the Commercial Filter Company of Boston, Massachusetts; and Peerless Electric Company, Warren, Ohio.

Q. Any others?

A. They are our principal lines. We handle Sauerisen Cement, which is a technical cement manufactured in Pittsburgh.

Q. You said your Los Angeles office Manager, I believe after Mr. Hawkins went down there, was Mr. Hawkins?

A. Not when he first went there, no, sir.

Q. Who was the manager?

A. My cousin, Mr. Wilmot L. Montgomery.

Q. How long did he remain?

(Testimony of W. Ray Montgomery.)

A. Until after Hawkins was there about a year, I would say.

Q. Then did he transfer to another office?

A. No, sir.

Q. He left your organization?

A. That is right; he went in business for himself.

Q. When did Mr. Herman Oswald go to the Los Angeles office?

A. After the war in 1945.

Q. 1945? A. Yes.

Q. Was he the Office Manager there?

A. No, sir.

Q. What was his position?

A. He was sent down to assist in the Los Angeles Office and [238] work under the direction of Mr. Hawkins.

Q. Is he still there? A. No, sir.

Q. Is Mr. Tomkins there? A. Yes.

Q. When was he employed?

A. Also in 1945.

Q. In 1945? A. That is right.

Q. At the Los Angeles office?

A. In 1945 or '46.

Q. He is still there?

A. Yes, sir. I think our records will show just what date each one of those went there.

Q. Subject to correction?

A. That is right.

Q. I won't hold you to the precise date on that.

(Testimony of W. Ray Montgomery.)

Was anyone employed after Mr. Hawkins left in Los Angeles? A. Yes.

Q. Who was employed?

A. Mr. Ray Gray and Mr. Ralph Dodge.

Q. How many people do you have in the Los Angeles office now?

A. At the present time or at that time?

Q. Now.

A. At the present time we have four [239] people.

Q. That is four men?

A. We have four men, yes, sir.

Q. And any women? A. Yes, sir.

Q. How many?

A. We have off and on two women.

Q. Two women? A. Yes, sir.

Q. So that you now have 6 people in that office?

A. Yes, sir.

Q. How many employees did you have in Los Angeles in 1948? Name them, if you please.

A. We had Mr. Edgar Hawkins, Mr. Herman Oswald, Mr. A. M. Tomkins, Miss Morrison, and a Japanese girl by the name of Tanaka, I believe her name is.

Q. So you had three men and two women in 1948? A. Yes.

Q. And today you have four men and two women? A. Yes, sir.

Q. How long was Mr. Conant employed by you whose name was mentioned the other day?

(Testimony of W. Ray Montgomery.)

A. He had been with us from about 1926 until he left our employ in 1949.

Q. 1949? A. Yes, sir. [240]

Q. When in 1949, if you remember?

A. May, I think, or June.

Q. Do you know where he is now?

A. Yes, sir.

Q. Where? A. In Denver.

Q. In what business is he engaged there, if you know?

A. He and another gentleman have a manufacturers' agency.

Q. Manufacturers' agency? A. Yes, sir.

Q. And he left you in May, you say?

A. May or June.

Q. Of 1949. That was four or five months after Hawkins? A. Yes, sir.

Q. What is this unit fire detector on aircraft used for that you speak of?

A. What is it used for?

Q. Yes, what is it? Just describe it. What does it look like?

A. I can show you a cut sample that will refresh my memory; otherwise I could tell you. We brought one here (producing object). This is a cutaway sample of the 17443-7 Fenwal fire detector.

Q. The outer coating differs from the industrial type which you have before you? [241]

A. Yes, sir.

Q. What other differences are there?

A. The internal construction is different.

(Testimony of W. Ray Montgomery.)

Q. The type of metal is different?

A. That is different, and also in total construction it is different, inasmuch as this is adjusted from the outside, and that is factory sealed.

Q. This is sealed at the factory?

A. Yes, sir.

Q. And the adjustments are fixed there?

A. Yes.

Q. So that the temperature tolerances are fixed at the factory?

A. So that they cannot change after it is on the job unless the change is made at the factory. We sell them with a guaranteed tolerance.

Q. So that it leaves the Ashland factory on the way to the airplane factory sealed and cannot be changed as to tolerance? A. That is right.

Q. What is that metal in there?

A. The straight metal?

Q. Yes.

A. I would say it is entitled a metal alloy; I don't know.

Q. You don't know what that metal is?

A. I have a good idea, but I am not sure.

Q. You don't know? [242]

A. There are many kinds of alloys to be used for that particular thing; that one would have to be tested to tell the exact mineral content.

Q. Under the figures you gave us yesterday—and these are just approximations; you may refer to the list you had with you yesterday, if you wish, Mr. Montgomery—in 1942 your profit on the sale

(Testimony of W. Ray Montgomery.)

of Fenwal products was about \$8000.00; is that correct?

A. If I checked that, I could tell. I gave you the purchase price and the selling price; it would be the difference between the two.

Mr. Doyle: I did some very difficult arithmetic to get these approximate figures.

Mr. Christin: May he have these before him?

Mr. Doyle: Certainly.

A. I can give it to you pretty close, yes, sir.

Q. In 1942, to repeat, your profit was about \$8000.00?

A. That's right.

Q. And in 1943 it was about \$18,000.00?

A. Well, between \$17,500.00 and \$18,000.00.

Q. In 1944 it was about \$8000.00?

A. About that, yes, sir.

Q. Pardon? A. Yes, sir, that is right.

Q. In 1945 it was about \$64,000.00? [243]

A. That is about right.

Q. In 1946 it was about \$91,000.00?

A. That is about right.

Q. In 1947 it was about \$55,000.00?

A. '47? About that.

Q. In 1948 it was about \$90,000.00?

A. That is right.

Q. Then what was your profit in January and February of 1949 on the merchandise which was shipped to you by Fenwal represented by the two statements you have just identified, totaling approximately \$47,000.00? You didn't yesterday give

(Testimony of W. Ray Montgomery.)

us the sales figures on the January and February shipments.

A. I think that is in our complaint. That covered the difference, or it is in a breakdown we gave you.

Q. I would like to have your testimony on it, if you recall it.

A. I can't tell you exactly. I could look at the statement that we submitted to you and give it pretty clearly.

Q. You are unable to state; perhaps during the recess you can determine what your selling prices on the shipments received in January and February were.

A. I could check our books and let you know this afternoon. Chances are that we will have time to get it.

Q. Do that, please.

Mr. Christin: You mean the amount of the unpaid bills? [244]

Mr. Doyle: Yes; we know what the price to Montgomery from Fenwal was; it was the amount of the unpaid bills. What I want to know is what Montgomery sold it for.

Mr. Christin: You have that, haven't you?

Mr. Doyle: I think not. I am asking what that figure is.

Mr. Christin: All right. What do you want him to get? The profit? You used the word "sales" in your question.

Mr. Doyle: On the basis of this, the profit is

(Testimony of W. Ray Montgomery.)

the difference between what Montgomery paid Fenwal and what Montgomery sold the items for.

Mr. Christin: That is correct.

Mr. Doyle: We know what Montgomery was supposed to pay Fenwal in January and February, and I want to know what they sold that merchandise for so that we can determine the profit on it.

Mr. Christin: You have that. Hawkins has that. I gave you this a week ago, if that is what you want.

(Handing document to Mr. Doyle.)

Go to the last page. Give it to the witness. I will hand you this. Maybe you can answer the question.

Q. (By Mr. Doyle): Just to simplify it, Mr. Montgomery, the total purchases by you from Fenwal in January and February were about \$47,000.00; is that correct?

A. The total—— [245]

Q. January and February shipments, 1949?

A. Were about \$49,000.00, you say?

Q. \$47,000.00.

A. I should say that is about the right figure.

Q. What did you sell that merchandise for that was shipped in January and February, 1947?

A. That is a matter of accounting. I would have to go through this whole thing to break it down, because this particular breakdown we have here, it is all in here.

Q. Then your testimony still is that you are

(Testimony of W. Ray Montgomery.)

unable to give me the figure; you will do so after lunch?

A. Until after I get it from our bookkeeper.

Q. Very well. As to the orders received before the end of February, 1949, for delivery after February, 1949, you claim a profit on them of about \$38,000.00, which, as you say, has been reduced somewhat by the cancellation of some orders?

A. Yes, sir.

Q. And that was the amount that you were claiming as profit when Mr. Storkerson came to see you in San Francisco?

A. Not at that time, no, because at the date he was there in—was on the 24th day of January, and we received many orders between the 24th day of January and the last day of February.

Q. Of course you did, but in principle you were claiming the profit on all orders for future delivery, and it now works out that that amount was about \$38,000.00 less cancellations? [246]

A. That is right.

Q. So that is what you and Mr. Storkerson were talking about when he came to San Francisco?

A. That is right.

Q. You were endeavoring to resolve that dispute? A. Yes, sir.

Q. You have told us in detail about that conversation? A. That is right.

Q. He said yesterday when he left San Francisco under the arrangement that he thought he had

(Testimony of W. Ray Montgomery.)

made with you here you were about \$3000.00 to \$4000.00 apart on those figures. Was that correct?

A. That would be altogether an assumption on his part. He had no facts to base that on due to the fact that he didn't know at that time what it was going to be.

Q. Looking back, taking the \$38,000.00 figure and using it backward, in January if you applied the formula that you were talking about in San Francisco that day, you would have gotten a profit of approximately \$4000.00 less than the amount you were claiming; is that correct?

A. I don't think so.

Q. Well, what profit would you have gotten on the formula you discussed that day?

A. The formula that we discussed that day was not a formula of determining our profit. We discussed, as I have testified to here just a few moments ago, that we expected all the profit on [247] all the orders that they had with deferred shipping dates and on all the orders that we would take between the months—between the 1st of January and the last of February regardless of when the merchandise would be shipped.

Q. I understand that, Mr. Montgomery.

A. That is what we were talking about.

Q. You and I have agreed that that would be about \$38,000.00 less cancellations?

A. That is right.

Q. So we are quite clear on that. I want to

(Testimony of W. Ray Montgomery.)

know if that was reduced to a formula at that meeting?

A. We had no formula unless he can look in a crystal ball.

Q. Well, it was understood that you would get all of your profit except that in part it would be reduced by 50 per cent, isn't that what you told us earlier; that you would forego 50 per cent of your profit on some of these orders?

A. Provided he would acquiesce to giving us all of the territory on exactly the same basis that we had it prior to that time.

Q. I understand that you were endeavoring to link a new contract for the northern territory with your bargaining on the amount of your profit; but linking those two together and giving up 50 per cent of your claimed profit, how far apart were you when he left San Francisco?

A. We had no way of knowing when he left here on January 24th, because we still had almost two months to go. [248]

Q. In any event, the formula, if there was one, was all of your profit on all orders and 50 per cent of your claimed profit on orders in the Los Angeles territory; was that about it?

A. That is what it turned out to be, but he certainly didn't know, and I am sure that I had no idea of the number of orders that we were to receive and what our profit would be.

Q. That was the basis upon which you were considering resolution of the difficulty?

(Testimony of W. Ray Montgomery.)

A. The basis that we were arguing with was the basis that I have outlined several times: That we would forego 50 per cent of the profit on the merchandise shipped after March 1st for aircraft orders provided we received a contract that would give us the same coverage and right that we had had all this time to handle all of the territory on the Pacific Coast on standard switches and the aircraft industry of the Boeing Company in Seattle. That was what the agreement was that he was to submit, and that is what we were arguing about.

Q. What part of your business was represented by Fenwal sales in 1948?

A. I couldn't answer that question to the last dollar, but it was a substantial amount.

Q. Well, approximately percentagewise?

A. I think the total amount—I can run this figure up pretty easily—of the Fenwal business was—in 1948, the total amount was some \$356,920.44. [249]

Q. Yes, we have that figure. That was your gross purchases. And your gross sales?

A. 482; that was our gross sales.

Q. Your spread was \$90,000.00. I want to know what percentage of your total business that represented.

A. I should say that represents about a third.

Q. About a third of your total business?

A. It might be a little more than that.

Q. And in 1947 when your profit was \$55,000.00,

(Testimony of W. Ray Montgomery.)

what percentage of your total business did it represent in that year?

A. I have no way of knowing unless I look at the figures.

Q. You couldn't even guess?

A. I wouldn't want to hazard a guess.

Q. You have got your books available here?

A. Yes.

Q. Mr. Roche is your bookkeeper and auditor, is he not?

A. That is right.

Q. Or Mrs. Roche.

A. Mrs. Roche.

Q. And those books are under her control?

A. Yes, sir.

Q. In 1949 how did your business of Montgomery Brothers over all compare with 1948? Was it off or——

A. It dropped down a certain amount of business that we would have gotten for Fenwal [250] Company.

Q. That wasn't my question. I want you to tell me how much your gross business was in 1949.

A. I would have to refer to our books to tell you.

Q. You are unable to tell us now whether it was more or less than in 1948?

A. I am unable to tell you accurately. There may be a difference of a few thousand dollars; it may be 50 or 75.

Q. Is it your testimony that it was more or less in 1949 than in 1948?

A. My testimony is that I don't know.

(Testimony of W. Ray Montgomery.)

Q. You will find out?

A. I can find out, yes.

Q. If it was less, was it substantially less?

A. I will find that out, and let the figures speak for themselves.

Q. You are unable to state whether your '49 business was more or less than the '48 business, is that right?

A. I am not in a position to answer that question intelligently.

Q. You are unable to answer it, is that it?

A. Because I would have to have the facts before me before I gave you the answer.

Q. I just want your recollection as to whether in 1949 you did more or less business than in 1948. Do you have no recollection on the subject?

A. I don't know whether it was better or worse. We do a substantial [251] amount of business; I can't very well carry these figures in my head all the time.

Q. With respect to the business of your Los Angeles office, and only your Los Angeles office, are you able to tell me whether it was greater or less in 1949 than in 1948?

A. It was considerably less.

Q. How much less?

A. That, I can't say again.

Q. You have those figures in mind, haven't you?

A. I haven't the figures in mind, because as manager of this company I am looking to the different territories from the standpoint of results;

(Testimony of W. Ray Montgomery.)

I don't look at them from the standpoint of dollars and cents as much as I do the overall picture. I know that they did less business in '49 than they did in '48; how much less, I don't know, because I have been trying to bolster the sales up.

Q. As to your overall, you don't know whether you did more or less in '49 than in '48?

A. I will have to check that up.

Mr. Christin: We have that here.

Mr. Doyle: The total business?

Mr. Christin: Yes.

Mr. Doyle: Let him check on it at lunch.

Mr. Christin: May we have the adjournment now?

The Court: Yes.

(Thereupon a recess was taken until 2:00 o'clock p.m.) [252]

Thursday, July 13, 1950—2:00 o'Clock P.M.

W. RAY MONTGOMERY

resumed the stand and testified as follows:

Cross-Examination

(Continued)

By Mr. Doyle:

Q. You were going to obtain for us, Mr. Montgomery, the figures on the 1949 business of your concern as compared with the 1948 business. Did you obtain those? A. Yes, sir.

Q. Will you state them, please?

(Testimony of W. Ray Montgomery.)

A. In 1948 our total sales were \$1,308,081.78; in 1949 our total sales were \$813,772.34.

Q. Gross sales? A. Yes, sir.

Q. What was your net in the two years?

A. Sir?

Q. What was your net in the two years, the difference between cost and sales?

A. You didn't ask for that and I haven't it available.

Q. Did I understand you to say that in the Los Angeles office you have now four men or three?

A. We now have four.

Q. That is one more than you had when you had the Fenwal line? A. Yes, sir.

Q. You were to give us also the January and February profit [253] on the purchases made in those two months from Fenwal—that is 1949?

A. I have that, yes. In January the profit on the Fenwal sales was \$8,517.20, and in February \$4,362.58.

Q. Are the purchases from Fenwal in January roughly \$30,000.00?

A. In January were \$28,044.16.

Q. On which the profit was \$8,000.00?

A. That is correct.

Q. And in February the purchases were \$17,637.17?

A. On which the profit was \$4,362.58.

Q. What was Mr. Hawkins' salary in 1948?

A. That was on a memorandum that we had here the other day.

(Testimony of W. Ray Montgomery.)

Q. Do you recall what his salary was per month?

A. In 1948 his gross——

Q. I asked you for his monthly salary.

A. I gave you that the other day. I can get it again.

Mr. Christin: You have the memorandum I gave you of that?

A. I haven't it here, I don't think; but I read it the other day from a memorandum.

Q. (By Mr. Doyle): Your testimony was that his gross compensation in 1948 was \$10,250.00?

A. That is right.

Q. Now I would like to know what his salary was.

A. I had it on that same memorandum, but I don't seem to have the memorandum here. If you can find that memorandum I can give [254] it to you.

Q. Does it accord with your recollection that it was \$300.00 a month?

A. I think it was a little over \$300.00. It must be in the record.

Q. I think it is in the record, the gross figure; the gross figures for each year are in the record, on the examination of your counsel, Mr. Montgomery, but the monthly salary wasn't.

Mr. Christin: I think it is in the deposition.

Mr. Doyle: I believe it is at Page 67 or 68. Perhaps you would refresh this gentleman's recollection by letting him see that, Mr. Christin, so that he can testify for the record.

(Testimony of W. Ray Montgomery.)

Mr. Christin: I had it on a piece of paper; I will try to find it. Didn't we give you a memorandum of it?

Mr. Doyle: No, you didn't or I wouldn't be asking for it.

Mr. Christin: I meant at the time of the deposition.

Q. Look in there; read that carefully; that will give it to you (handing deposition to witness).

A. You want to know his salary in 1948? Again, this doesn't give his salary; it gives the gross income.

Mr. Christin: If you will read on you will find it is broken down.

A. The salary was \$3750.00.

Q. (By Mr. Doyle): In what year?

A. For 1948. [255]

Q. In 1948?

A. Yes, sir, according to this document.

Q. What was it in 1947?

A. The salary was \$3600.00.

Q. In 1946? A. \$2400.00.

Q. In 1945? A. The same.

Q. In 1944?

A. It doesn't say, but it must have been the same.

Q. In 1948 was there a bonus arrangement?

A. Yes, sir.

Q. When was that paid?

A. It was given with a Christmas letter.

(Testimony of W. Ray Montgomery.)

Q. Was there any understanding about a bonus in the year 1948? A. No, sir.

Q. That was paid in your discretion at the end of the year? A. Yes, sir.

Q. Was there an understanding about a bonus in '47? A. No, sir.

Q. But one was paid at Christmas time?

A. Yes, sir.

Q. In addition to the monthly salary?

A. Yes, sir.

Q. Was there any understanding about a bonus in 1946? [256] A. Yes, sir.

Q. What was that understanding?

A. He was to receive the same bonus that we had—the same percentage of bonus that we had paid in 1945.

Q. Then what was the bonus understanding in 1945?

A. In 1945, which was the end of the war year, when salaries were unfrozen, and to compensate him for the work that he had done during the war years I agreed to pay him a bonus, in place of just an amount that we would arbitrarily give, 5 per cent of the net profits.

Q. For that year? A. For that year.

Q. And was that paid to him?

A. It was, and in—

Q. 5 per cent of the net profit on what? All of the Montgomery business or Fenwal sales?

A. On all of Montgomery Brothers business.

Q. For 1945? A. Yes, sir.

(Testimony of W. Ray Montgomery.)

Q. And the same for 1946? A. Yes, sir.

Q. But no arrangement for 1947?

A. I discontinued the arrangement that we had in 1945 and '46 at the beginning of 1947 and reverted back to the same method of compensation that we were using with all the balance of our employees. [257]

Q. No understanding about a bonus?

A. No, sir, except that there wouldn't be a 5 per cent of the net profit of Montgomery Brothers in '47.

Q. It was whatever you decided to pay?

A. That is right.

Q. If anything? A. That is right.

Q. Did you have any contract with Mr. Hawkins?

A. Only on a basis of he an employee receiving from us his salary at the end of each month.

Q. And how often was he paid?

A. Twice a month, the 1st and 15th.

Q. In early January of 1949 you had a Dun & Bradstreet report on Fenwal, did you not?

A. Yes, sir.

Q. That showed the status of Fenwal's business as of what time?

A. That was a report, commercial credit report of the Dun & Bradstreet people that we received from Dun & Bradstreet after we had—after the termination notice had been sent us. We merely got it through the customary channel, asked Dun & Bradstreet for their report.

(Testimony of W. Ray Montgomery.)

Q. And as I recall your testimony on the deposition, you said that that showed a weak financial condition, you felt? A. Yes, sir.

Q. Was that true on January 24, 1949?

A. January 24th?

Q. Yes, 1949?

A. Yes, sir, as reflected by that report.

Q. That was also true, so far as you know, on February 21, 1949? A. Yes, sir.

Q. Now, you were telling us, had not completed the total percentage, or the percentage of Fenwal business to your total business; did you check that out further for the years in question?

A. I have given you the total business for Fenwal; the total sales for Montgomery Brothers in the year '49 I have also given you, and in '48 I have also given you. In '47 they were \$1,884,304.45; and in 1946 that you asked for, I gave you \$1,943,-995.81.

Q. That is '46?

A. From '46 to '49, and I have already given you the amount of business that we did with Fenwal, so that it is a very easy calculation to divide one into the other.

Q. Yes, that is right. Thank you. Did you make any special sales efforts during the months of January and February of 1949?

A. I attempted to close all the business that we possibly could before the expiration of our contract.

Q. You circularized your personnel to that effect?

(Testimony of W. Ray Montgomery.)

A. And I was also assisted by Mr. Storkerson in making the [259] rounds of all the aircraft companies in which he told me and told them to place all of their orders that they had to give to the expiration of our contract, March 1st, with Montgomery Brothers.

Q. And on that call he facilitated and helped you in that regard? A. That is right.

Q. That was when you went to Los Angeles in the end of January? A. That is right.

Q. After your discussion in San Francisco?

A. Right.

Q. What was the meeting at the Savoy Hotel in Los Angeles at the end of that week with the aircraft companies? What was the reason for that meeting?

A. The reason for that meeting that Mr. Storkerson was going to leave the Coast to go back to his factory and talk with his people.

Q. You understood he had already telephoned them? A. That is right.

Q. At your San Francisco meeting?

A. And I wanted to be sure that he was going to put the proposition up to them exactly as we had put it up to him, and at that particular meeting I asked and argued with him and he conceded, that it would be best for us to handle the Boeing account, with the one exception that the orders would be given directly from the [260] Boeing Company to the Fenwal Company and not the procedure that we had had prior to that time of the orders being

(Testimony of W. Ray Montgomery.)

given to Montgomery Brothers and Montgomery Brothers orders being given to Fenwal.

Q. To that extent were you seeking a modification of the tentative understanding you had reached at San Francisco? A. That is right.

Q. That was the only new thing that was added to the discussion at that time? A. Yes, sir.

Q. When did you first learn that Dr. Walter had seen Mr. Hawkins in September of 1948 at Los Angeles? A. From Mr. Hawkins.

Q. When? A. On January 10th.

Q. January 10th? A. Yes, sir.

Q. In your discussion with him?

A. Yes, sir.

Q. At Los Angeles? A. Yes, sir.

Q. Now, we touched this morning upon the date of payment. There wasn't any question, was there, that the regular date of payment of your account with Fenwal Company was the 10th of each [261] month? A. No, sir.

Q. It was the 10th of the month regularly as the routine business of the two organizations?

A. That is right.

Q. Did you obtain a folder of trade information from Fenwal at the time you took over their representation in 1942?

A. Will you repeat that?

Q. A folder of trade information, literature on their product and merchandise?

A. I received in '42?

(Testimony of W. Ray Montgomery.)

Q. Yes.

A. Only their regular catalogues that we give out ourselves to all our customers.

Q. Did they supply you any information concerning the merchandise from time to time?

A. From time to time they did, yes, sir.

Q. Catalogues? A. Yes, sir.

Q. And you are familiar with the publication "Fenwal Facts" are you? A. Yes, sir.

Q. What is "Fenwal Facts"?

A. The house organ of the Fenwal Manufacturing Company.

Q. Then in addition to "Fenwal Facts" there was other literature printed and prepared by the Fenwal organization in Massachusetts which came to your hands and was distributed to the [262] trade?

A. I assume that all of the literature that they had to offer to the trade in other parts of the country was sent to us so that we could in turn give it to our customers on the Pacific Coast.

Q. That was your expectation in any event?

A. Yes, sir.

Q. Of the total sales to aircraft what was the division roughly between the continuous fire detector and the unit fire detector?

A. We sold very little of the continuous fire detector, and the only orders that we took after the first order that I took on the Fenwal continuous fire detector, which was early in the production of that particular product, I sold to Pan American

(Testimony of W. Ray Montgomery.)

Company in San Francisco, and they had a failure before they got out of the Golden Gate. From that time on I only made such sales as had been specified on Government planes, and due to the red tape of the Government, even though we admitted that it wasn't a satisfactory application, it had to be put on the planes so that they could be accepted by the United States Government.

Q. Well, when you said this morning that you pioneered or engineered the unit fire detector, did you mean the continuous? A. No, sir.

Q. You distinguish them? A. Yes, sir.

Q. And you didn't do the pioneer work on the continuous fire detector? [263]

A. I had nothing to do with the continuous except to sell it.

Q. You say that it was not a substantial part of your sales?

A. No, sir. Upon the failure of that particular proposition I developed the unit detector.

Q. You developed that in the middle of 1944?

A. Whenever that happens to be.

Q. That is your recollection, that it was in the middle of that year? A. About that.

Q. I will show you a copy of a pamphlet entitled "Fenwal Facts About Thermoswitches of Interest to Engineers" and ask you if that is the publication of which you have testified?

A. Yes, sir, that is right.

Q. And that is an example of the type of thing?

A. Yes.

(Testimony of W. Ray Montgomery.)

Mr. Doyle: I request that this be marked as Plaintiff's Exhibit Number next in order, 34.

The Court: Plaintiff's Exhibit No. 34 in evidence.

(Publication referred to was marked Plaintiff's Exhibit No. 34 in evidence.)

Q. (By Mr. Doyle): Now, I direct your attention to the fact this Plaintiff's Exhibit 34 is dated November, 1940, and that the first sentence of the first paragraph reads as follows:

"Tests were recently conducted on the Fenwal Cartridge Thermoswitch to determine its adaptability [264] as a close control for fire protection purposes. These tests were in response to a request from one of the largest aviation companies in this country. Their requirement is for an electrical control which would react in minimum time upon coming in contact with an open flame. While the tests outlined below were not conducted with an open flame they are relatively indicative of the immediate response, to temperature changes, available in the Cartridge Thermoswitch."

And I ask you whether that refreshes your recollection about the original use of the Fenwal Thermoswitch as a fire detector in aircraft?

A. So far as my recollection is concerned, the first use by any aircraft company as a fire detector was on the Constellation, or preferably on the Government version of the Constellation which was

(Testimony of W. Ray Montgomery.)

produced before the end of the war and which had been engineered and tested prior to the death of Miss Amelia Earhart, because she and Art Hughes were the ones that used the flying laboratory, and at that time that was to my knowledge the first use of a unit fire detector.

Q. Mr. Montgomery, don't you know that Curtiss-Wright was using fire detectors in their planes at Buffalo in 1941? A. No, sir.

Q. Would you deny that that is so? [265]

A. I don't know anything about Curtiss-Wright activities in Buffalo. I do know that Curtiss-Wright was using an overheating switch in their airplanes in 1941.

Q. A Fenwal Switch?

A. That is right, but that was merely a temperature device the same as you have on your automobile to show that the radiator temperature or water temperature of the engine is increased over what it should be.

Q. Do you know whether the Lockheed Company at Los Angeles was using a Fenwal switch as a fire detector in 1941?

A. That they were using it?

Q. Yes. A. I had no knowledge of it.

Q. Do you know whether engineering work was done in that year upon the use of the Fenwal Thermoswitch in that connection?

A. That was before I had the Fenwal account, so I wouldn't know.

(Testimony of W. Ray Montgomery.)

Q. It was, however, an account of Fenwal before you took over, was it not?

A. They possibly had been selling them with the previous representative that I knew nothing about.

Q. I direct your attention to a copy of memorandum addressed to "All representatives." Incidentally, who was E. P. Griswold?

A. He was Sales Manager for the Fenwal Company, if my memory serves me right. [266]

Q. Prior to Mr. Carl Robinson—prior to the present Sales Manager?

A. That is right.

Q. I direct your attention to a copy of that memorandum dated December 17, 1943, addressed, "To All Representatives" from E. P. Griswold, and signed "E. P. Griswold, Sales Manager," and ask whether that memorandum came to you in the usual course of business between Fenwal and Montgomery Brothers?

A. I have no way of knowing, but I assume that it did, sir.

Q. Very well. Now, directing your attention to the two pamphlets attached to it, which I believe you will notice are referred to in it, do you have any recollection of ever having seen either of them before?

A. I have seen this one, yes, sir.

Q. That red catalog you have seen?

A. Yes, sir.

Q. That is a Fenwal catalog for the trade?

A. That is right.

Mr. Doyle: I will request that the documents

(Testimony of W. Ray Montgomery.)

identified be marked Plaintiff's Exhibit next in order.

The Court: Plaintiff's Exhibit 35 in evidence.

(The letter and catalogs referred to were marked Plaintiff's Exhibit No. 35 in evidence.)

Q. With respect to the red catalog, which bears on the front of it, "For Safety in Flight Fenwal Fire Detectors Unit or Continuous Types"—

A. Yes, sir. [267]

Q. That would refer to both the unit and the continuous type to which you have testified?

A. No, sir.

Q. Will you explain what it does refer to then?

A. In this particular unit it shows the picture or cross-section, cutaway picture, of a standard Fenwal Thermoswitch. It also shows a cutaway sample or picture of their continuous thermostat. But the fire detectors that I described as having been developed by Montgomery Brothers and the Lockheed Company were just as different as this as day is from night.

Q. They were different from that unit type of detector?

A. Absolutely, yes.

Q. In what respects did they differ?

A. In the modifications and type of unit we used.

Q. But this unit detector for airplane use was in use more or less from the date of that pamphlet?

A. I don't know that; I don't think there were any of them in use; I think they were offered for sale but not in use.

(Testimony of W. Ray Montgomery.)

Q. You think they were offered for sale but not in use? A. Not that I know of.

Q. I direct your attention to the date of this pamphlet. Do you recall seeing it on or about its date? A. That is in '43—10/1/43. [268]

Q. Yes. A. I would say yes.

Q. You received it on or about its date?

A. Yes, sir.

Q. And it came through the company's channels from Ashland, Massachusetts? A. Right.

Q. Mr. Montgomery, you referred this morning to assignments and to the meeting at Lockheed at which those were agreed upon early in March, 1949?

A. Yes, sir.

Q. The question of assignments of those orders had been discussed? A. As such, yes, sir.

Q. With Mr. Storkerson? A. Yes, sir.

Q. There had been no prior discussion of the assignment of those aircraft orders?

A. As such, there had been none.

Q. What do you mean by "as such," as distinguished from something that was not?

A. As an assignment of all orders. During his visit on the 24th day of January, his first proposal that I testified to this morning was that they would accept—that they would ship all of the orders that they had accepted prior to cancellation and would ship as many of the orders as we could get for shipment between [269] the time of January the 1st and March 1st as possible, and then we were to turn over those orders to them and they would

(Testimony of W. Ray Montgomery.)

carry on from that point and that we would be through as far as profit was concerned. That was his proposition which we did not accept.

Q. I direct your attention to Plaintiff's Exhibit No. 9, the same being Dr. Walter's letter to you on February 4, 1949, which I understand you say was pursuant to Mr. Storkerson's call to him.

A. Yes, sir.

Q. And ask that you read Paragraphs 2.2.1 and 2.2.2 into the record, if you will.

A. "2.2.1. Montgomery Brothers shall request permission of the customer to assign the orders to Fenwal and, if permission is given, shall assign such order to Fenwal at once.

"2.2.2. Fenwal shall bill all assigned orders and pay Montgomery Brothers as commission, an amount equal to 50 per cent of the amount they would have earned had the orders not been so assigned and had the territory contract not been cancelled."

Q. You replied to that letter on February 14th?

A. That is right.

Q. Plaintiff's Exhibit 11. I ask you to read, if you will, please, Paragraph 2.2.1 of that letter?

A. "2.2.1. On all orders where shipments are to be made [270] after March 1, 1949, in the Los Angeles area or Southern California territory, Montgomery Brothers are to request permission of the customer to assign the orders to Fenwal, Incor-

(Testimony of W. Ray Montgomery.)

porated, and if permission is given, shall assign such orders to Fenwal, Incorporated, at once."

Q. Does that refresh your recollection as to whether the assignment of those orders was discussed?

A. The terminology of "Assignments" was given for the first time in that letter from Dr. Walter. The agreement that we had with him was that we were to turn the orders over to them. The mechanics of the turnover, which he calls "Assignment," I don't think was discussed as such. It was understood, however, that they were going to do the billing after that had they accepted our proposition.

Q. Mr. Montgomery, your relationship with the Fenwal Company over the years had been an amicable one, had it not?

A. Yes, sir, to all intents and purposes, yes, sir.

Q. I understood you to inform us that you hadn't had any criticism from the Fenwal Company of your handling of their affairs?

A. Any criticism?

Q. Yes. A. You are correct.

Q. And that it came as a great surprise to you when they cancelled your contract? [271]

A. It did.

Q. And that you had never in the course of your business dealings received complaint from them about their relationship or your servicing of their product?

A. We had never had any complaint whatsoever.

(Testimony of W. Ray Montgomery.)

Q. You recall, do you not, that various representatives of the Fenwal Company from Ashland called upon you and your associates in California from time to time? A. They did.

Q. You remember that Mr. Robinson called upon you from time to time?

A. I think he was out here on two different occasions.

Q. Do you remember Mr. Turrene who held the patents on these instruments called upon you from time to time?

A. Yes, sir, I think he was out here on three different occasions.

Q. Do you recall whether upon any of those occasions any criticisms were made of your handling of that account?

A. I am positive that there was no criticism made of the way we were handling the account.

Q. Do you recall a visit of Mr. Robinson to your Los Angeles office in October of 1946?

A. Was I present at that time?

Q. I asked if you recalled the visit, Mr. Montgomery?

A. He was out there. If I was out there at that time,—I [272] can recall that I met him there, because I tried to be present at the places he would be when he was coming out here.

Q. And you did see Mr. Robinson on his trips to the Coast?

A. If he was here at that time I possibly did.

Q. Do you recall a discussion with him at that

(Testimony of W. Ray Montgomery.)

time concerning a reduction of the amount of your profit on certain items? A. In Los Angeles?

Q. At any meeting with Mr. Robinson that year.

A. I think I had a discussion with him about the reduction of the fire detector switches, but that reduction was—that conversation was held in Ashland.

Q. When?

A. At the time that the change was made—shortly after it was made, from a net of 20 per cent to a net profit of 15 per cent.

Q. Did he request that change?

A. We were discussing the idea of securing more profit on all their lines, and that was in the settlement. We came to an agreement that we would give and take. We received—we took a reduction in that particular case and an advance in other amounts of profit.

Q. When was that?

A. I would have to check the date of the change of prices; that would tell about the date. That was a meeting that I had at Ashland, and the date would settle whether it was in the Fall [273] or the Spring, because I made ordinarily a couple of trips a year.

Q. Of what year? '46?

A. I wouldn't know until you show me——

Q. It wasn't '48, the last year of the contract?

A. That we made that change?

Q. Yes. A. I wouldn't know that.

Q. You don't remember when it was?

(Testimony of W. Ray Montgomery.)

A. I remember the conversation, but the exact date I can't give you.

Q. Did this relate to the so-called 17,343-6 fire detector?

A. That's right; that was the one that we reduced from 20 per cent profit to Montgomery Brothers to 15 per cent by mutual agreement.

Q. That reduction was made?

A. That is right.

Q. Did Mr. Robinson express any dissatisfaction with the representation at that time?

A. He didn't to me.

Q. Did you?

A. Dissatisfaction of us?

Q. Yes, with the relationship?

A. I don't understand that question.

Q. You were asked for and gave a reduction in your profit. [274] Did you express any dissatisfaction about it or about the relationship?

A. After the argument that we had, we will say after the decision had been reached, when I was trying to raise prices and he was trying to lower the prices, we finally came to a mutual agreement of raising some and reducing others, and we reduced one and raised I think, two or three.

Q. Did you express dissatisfaction with the situation in the course of that discussion?

A. I didn't like the idea, if that is what you mean—I didn't like it at all; I didn't like the idea of him reducing our amount, but I conceded to it

(Testimony of W. Ray Montgomery.)

at the moment they agreed to give me a longer profit on some items than I had been getting.

Q. Do you remember a visit of Mr. Robinson made to San Francisco in the Autumn of '47?

A. I think I do, yes, sir.

Q. Do you remember that he sent you a report on his return to Ashland?

A. Yes, sir.

Q. About that trip to California?

A. That is right.

Q. I show you, Mr. Montgomery, a copy of a letter dated August 26, 1947, addressed to Montgomery Brothers, attention F. H. Montgomery, and Mr. Ray W. Montgomery, signed Fenwal, C. J. Robinson, and ask you if that was the communication transmitting [275] the report and if the report attached to that is the report you received?

A. Yes, sir.

Mr. Doyle: I request that the document identified be marked Plaintiff's Exhibit 36, offered in evidence.

The Clerk: Plaintiff's Exhibit 36 in evidence.

(Letter Fenwal to Montgomery, August 26, 1947, and attached report, marked Plaintiff's Exhibit No. 36 in evidence.)

(Testimony of W. Ray Montgomery.)

PLAINTIFF'S EXHIBIT No. 36

August 26, 1947

(dictated August 25, 1947)

Montgomery Brothers, San Francisco

Mr. C. J. Robinson

Report on West Coast Activities

Attention: Mr. F. H. Montgomery and
Mr. W. Ray Montgomery

Dear Ray and Fred:

Mr. Turenne and I and our wives wish to thank you very much for the courtesies which you extended to us on our recent trip. We all certainly appreciate it and you can rest assured that we are looking forward to a return visit.

As I advised you in a recent letter, I have been working on the attached report covering the West Coast activities. I feel that the facts as set forth merit attention for our mutual interests.

Very truly yours,

FENWAL INCORPORATED,

C. J. ROBINSON,

Sales Manager.

CJR:dd

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

August 26, 1947

(dictated August 25, 1947)

Montgomery Brothers, San Francisco

Mr. C. J. Robinson

Report on West Coast Activities

Attention: Mr. F. H. Montgomery and
Mr. W. Ray Montgomery

Montgomery Brothers—Seattle Office

I was very much interested in meeting the personnel of your organization in this office. I feel that your headquarters are adequate, and that considerable work can be done for Fenwal in this sector.

Every effort should be made to cultivate Dick Reed's interest. He has expressed a desire himself to learn more about the functions and applications of Fenwal Thermoswitches. Naturally, he is just getting his feet on the ground, and I feel that he is quite definitely a valuable asset to your organization. However, with the expanse of territory you have in this sector, it is advisable that you add one or two more sales engineers to your staff if possible. I do not feel that this sector has been adequately covered, either from the standpoint of manufacturers or industrial users. A great deal of hard work will have to be done in order that the business can be developed. I discussed with Dick Reed many possible applications for Fenwal Thermoswitches in

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

industry and pointed out to him that there was an unlimited field for Fenwal Thermoswitches in the control of temperature and the detection of temperature. Naturally, however, it takes time to ferret out all of these applications. I feel that Spokane can be developed as a good market for Fenwal Thermoswitches if time and effort are expended in this direction.

I also feel that considerable time and effort should be spent at Boeing, since it is evident that they are at present one of the aircraft companies which have contract planes to build, and consequently should be worked with from all directions. It is my further opinion that even though the Edison Fire Detector System is specified on the planes which they are manufacturing, constant hammering will bring them around to realizing the definite merits of our Fire Detector over Edison.

Dick Reed and I made a call to the Kenwood Motor Corporation. This is another account which merits attention. While the preliminary call was merely one of getting acquainted, more calls should be made as follow-ups, and actual work done with the prospect.

It was also noted that very few Fenwal Thermo-switches of the standard type were stocked in this sector. It is my opinion that more standard Thermo-switches should be held in stock in order that Dick Reed will have something to work with for immedi-

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

ate installation and as business develops, over the counter sales will result.

As you know, we had a very interesting luncheon with two of the scientific sales outlets in Seattle, and any assistance which can be given them to stimulate sales through their organizations should be exploited.

I feel that as you increase the organization in this sector, it would be wise to delegate full responsibility for Fenwal to one of the sales engineers who would specialize on our account. In this way, more concentrated effort can be directed to the account in general. It is suggested that with Dick Reed's experience in aircraft, he be set up tentatively to specialize on Fenwal Thermoswitches.

Montgomery Brothers—Portland Office

In discussing the sale of Fenwal Thermoswitches with Bob Hermann, I felt that he is limited because of the territory he has to cover alone. I do not know whether you are grooming his assistant in the office to eventually work in the field. I sincerely hope that you are contemplating adding more personnel to the staff in Portland. Through the addition of personnel, greater coverage can be given to this sector, particularly to industrial sales and the ferreting out of manufacturers. I spent considerable time with Bob going over the entire Fenwal line, manufacture, operation and application of Fenwal Thermoswitches, and I sincerely hope that our discussion will be mutually profitable.

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

I also noticed that there was a very limited stock of standard Fenwal Thermoswitches in Portland. While I appreciate that shipments can be made from San Francisco and Los Angeles, it would still be advantageous from a sales point of view to have a reasonable quantity of Fenwal Thermoswitches for over the counter sales or immediate delivery to potential customers. A search of the sales records at Portland should indicate the most popular types of standard Thermoswitches which heretofore have been sold in that territory. Industrial selling, naturally, will lead to probably more special type Thermoswitches. However, the greatest amount of industrial sales can be adequately taken care of with the standard type.

Montgomery Brothers—San Francisco Office

I was very much impressed with the arrangement of things which you have in San Francisco. You certainly should have very beautiful offices when your modernizing program is completed. It was unfortunate that we were not able to cover the entire San Francisco sector and make more personal calls.

I know that you are contemplating adding to your staff, and such additions should, through effort, increase sales. It is agreed that more effort should be placed on the increase of industrial sales to broaden our application scope and increase the number of Fenwal users. Since San Francisco appears to have several manufacturing accounts, it is apparent that

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

considerable sales engineering work should be done along these lines, even to the point of reconverting some of these manufacturers now using other types of thermostats to the use of Fenwal Thermoswitches.

We feel quite certain that you can move a considerable quantity of our Appliance Thermoswitches with many of these manufacturers. It should be pointed out, however, that caution should be exercised, depending upon the type of application encountered, and the sale of the standard type Thermoswitch is often the best decision, the Appliance Switch having a certain limited range and flexibility.

We also feel that someone in the San Francisco office should specialize on the sale and application of Fenwal Thermoswitches. We sincerely trust that you agree with us in this matter.

Montgomery Brothers—Los Angeles Office

As you realize, the greatest amount of work done on the West Coast from the point of time expended was in Los Angeles. We feel that Edgar Hawkins is doing a very good job in contacting aircraft companies. I do feel, however, that lack of coverage has been due, in part, to wartime conditions. I feel that by increasing the personnel in this office, you have now relieved Edgar of a great deal of responsibility which he had to accept during the war. This, of course, will immediately release him for greater sales effort and customer contact.

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

I made an agreement with Edgar which I trust will meet with your approval, that they have permission to screen any Fenwal Thermoswitches which are returned to them for variance in temperature calibration, lack of temperature control, etc. I cautioned him, however, not to take the responsibility on himself for Montgomery Brothers or Fenwal by recalibrating such Thermoswitches and returning them to the customer. We still feel that we wish to be directly responsible, and I pointed out to Edgar, that many times recalibration of the Thermoswitch is not the entire answer. We would like to see the Thermoswitches which, through his screening, prove to be out of temperature setting. Our inspection of them might show an error in our manufacturing process.

I was quite disappointed that we did not cover more territory in and around Los Angeles, however, conditions made this somewhat impossible, and it was considered advisable to correct some errors and misunderstandings with the aircraft companies. We feel that we accomplished this and probably on our next visit, we will have more opportunity to work with other types of manufacturers and industrial users.

I believe you advised us that Edgar Hawkins is specializing on the sale and application of Fenwal Thermoswitches. We certainly are going to do everything possible to cooperate with your entire

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

organization in furnishing you the answers and service which you require.

I noted on our visit to San Diego that very little work, if any, had been done with any type of manufacturer or industrial user other than the aircraft manufacturers. I feel it advisable that more effort be placed in contacting potential manufacturers and industrial users in San Diego, along with a planned program for the same in Los Angeles.

Summing up the visit to your territory, I am impressed with the personnel in your offices. I sincerely hope that those additions which you contemplate making to your organization will be of the same calibre. I feel that Fenwal, through the program which is now in process, can render you considerable service and assistance in producing sales. This program is devised to furnish all of our representatives with more practical and technical information regarding the sale and application of our Thermoswitches. This will be conveyed to you in the near future through the medium of a Sales Manual and supplementary additions. This is entirely separate from the already existing General Sales Letter messages.

I felt through the entire territory that there was not attention given to the distribution of catalogs to the proper places. We found several instances where the personnel visited had not received the latest Fenwal catalog. This is most alarming and disappointing. I trust that you will take steps to

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

correct this. As previously suggested, the leather cover catalog should be forwarded to all head purchasing agents and outstanding companies. The paper bound catalog can be used for general distribution. I can well appreciate that there are certain instances where catalogs such as ours would be wasted. I think we are in agreement on this point. However, I did definitely note many important places visited had not even heard of our latest catalog. Please see that catalog distribution into the hands of customers and prospective customers becomes a planned program.

I also noted that our name is not lettered on the door or window of all of your offices. We certainly feel that accounts such as ours should be announced to the public passing by or entering your offices. I am pleased to note that you have listed yourselves as our representatives in all of the telephone directories. It was also quite forcefully called to our attention by the Chief Engineer of one of the aircraft companies that while Montgomery Brothers' calling card was very attractive, it did not indicate who they represented, and we were required to leave Fenwal calling cars to indicate that Montgomery Brothers and Fenwal are closely associated. Won't you please take steps to correct this. We feel that probably all the companies you represent can be printed on the back of your calling cards, or that you might have special calling cards for each account, to be distributed where it will do the most good. Certainly

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

the situation referred to above was somewhat embarrassing for both of us.

I would again like to point out to you that more standard Thermoswitch stock should be allotted to the Seattle and Portland territory in order that service to customers can be accelerated. I would also like to point out to you again that we can be of assistance to you. We can appreciate your not wanting to bother us with all sorts of details, however, I am of the opinion that, in some cases, we should be consulted until our overall information program gets into full swing.

In reviewing your present method of handling all correspondence through the San Francisco office, I would like your opinions on how we can speed up our service to the customer. It was very definitely impressed upon me by the aircraft companies, particularly Lockheed, that they feel that the present method of handling the business is too slow, and they would like permission to work with us directly. Naturally, I told them that we would prefer to follow the present procedure, and that we and Montgomery Brothers would make every effort to speed up answers to their questions and problems. Along this line, I feel that we should send you, in addition to the originals of correspondence, two additional copies which you can forward directly to your branch offices upon receipt of the general mail. This certainly should save a lot of copying and clerical work on your part, and should accelerate service.

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

I would also appreciate your thinking on the possibility of allowing your branch offices to deal with us directly regarding applications, at certain times, sending copies of their letters to you. I cannot help but think that the personnel in your branch offices would at times appreciate direct contact, and see no reason why, except in rare instances, such a procedure cannot be developed. Your comments on this will be appreciated.

In closing, I feel that with your present organization, plus the additions which you intend to make, you should be able to give excellent coverage of our account on the West Coast. It must be remembered that the aircraft industry is at present nowhere near as productive as during the war. They are, however, all designing new planes. We certainly hope that your contact with them will be at the point of original design so that Fenwal may be specified and called out on the first experimental models. We do not feel that you have always contacted experimental design until it has been too late, then double effort must be expended to change specifications. I also feel that far more work can be expended in furthering the sale to manufacturers of original equipment and industrial users. This, as you can appreciate, is the backbone of our business, and we are particularly interested in increasing the volume sales of standard Thermoswitches and increasing the number of customers using a few Thermoswitches for their industrial processes. We suggest that you

(Testimony of W. Ray Montgomery.)

Plaintiff's Exhibit No. 36—(Continued)

review the increase of industries on the West Coast over the past year. I feel you will be quite startled at the quantity. Certainly all of these have not been contacted, and when contacted, the business which results should be very satisfactory. We are indeed looking forward to your increased concentration on our account and assure you of our continued cooperation.

C. J. ROBINSON,
Sales Manager.

CJR:dd

S.F.-3 copies

cc: Mr. Storkerson

[Endorsed]: Filed July 13, 1950.

Q. (By Mr. Doyle): Did you reply to that communication?

A. I should say that we did.

Q. I show you a letter on the letterhead of Montgomery Brothers dated September 11, 1947, attention Mr. C. J. Robinson, "Dear Robbie," and ask you if that was the reply?

A. That was the reply that was sent by my brother to Mr. Robinson.

Q. After discussion with you of the report addressed to both of you? A. That is right.

Mr. Doyle: I request that the document be marked Plaintiff's Exhibit next in order.

(Testimony of W. Ray Montgomery.)

The Court: Plaintiff's Exhibit No. 37 in evidence.

(Letter dated September 11, 1947, Montgomery to Fenwal, was marked Plaintiff's Exhibit No. 37 in evidence.)

PLAINTIFF'S EXHIBIT No. 37

Inter-Office Correspondence

September 11, 1947

From: Montgomery Brothers, San Francisco 3

To: Fenwal, Inc.

Subject: Report on West Coast Activities

Attn: Mr. C. J. Robinson

Dear Robbie:

This will acknowledge and thank you for your report of August 26th, which has been carefully perused by not only ourselves, but other key men in our organization, and it is the concensus of opinion that your trip to the Pacific Coast was really worthwhile, and will be productive of good results. We like constructive criticism and by working together we are satisfied that profitable results will manifest themselves in the not too distant future.

In regard to our method of handling our business on the Coast, insofar as getting prompt action, information and other pertinent data to our customers, I can assure you that if you will give us

(Testimony of W. Ray Montgomery.)

complete, accurate and prompt attention to every inquiry that we make, insofar as shipping, prices, engineering data, etc., we will get the information to our customers and everybody will be happy and satisfied.

We have written you no less than five or six letters, trying to get shipping information for the aircraft companies over a period of many weeks, and when we did get a promise or information, many times it was not correct, or you were unable to live up to the information you gave us, so naturally this caused dissatisfaction.

If you will do your part, we can assure you we will do ours, and as we have teletype machines ordered for our Pacific Coast offices we will be in constant contact with them, and no delay will occur. Under the circumstances we request that all information, regardless of its nature, be handled through San Francisco, with the three copies of each letter as you have suggested, so that our branches will have on file the complete story, the same as we have here.

With kindest personal regards from the writer to all members of the Fenwal organization, we remain

Yours very truly,

MONTGOMERY BROTHERS,

/s/ F. H. MONTGOMERY.

FHM:da

[Endorsed]: Filed July 13, 1950.

(Testimony of W. Ray Montgomery.)

Q. (By Mr. Doyle): Now, directing your attention to the second sentence of your letter to Robinson in response to his report, [276] and particularly to this language: "We like constructive criticism and by working together we are satisfied that profitable results will manifest themselves in the not too distant future." Does that refresh your recollection as to whether there was any criticism of your handling of this account?

A. There was no criticism; there were suggestions offered as to what they thought they might do or we might do to increase business—no criticism whatsoever.

Q. You distinguish between suggestions for improvement and criticism of the situation as it existed?

A. Absolutely; the meaning is altogether different.

Q. You were not, however, unaware that they were making constant suggestions for better representation?

A. That was the only suggestion they ever made, to my knowledge.

Q. I show you, Mr. Montgomery, a copy of a letter addressed to Montgomery Brothers from C. J. Robinson dated June 4, 1948, to the personal attention of W. Ray Montgomery, and ask you if that was received in the usual course of business?

A. Yes, sir, that letter was received.

Mr. Doyle: I request that it be marked Plaintiff's Exhibit next in order.

(Testimony of W. Ray Montgomery.)

The Clerk: Plaintiff's Exhibit 38 in evidence.

(Letter dated June 4, 1948, Fenwal to Montgomery, was marked Plaintiff's Exhibit 38 in evidence.)

PLAINTIFF'S EXHIBIT No. 38

(Copy)

Air Mail

Special Delivery

June 4, 1948

Montgomery Brothers—Portland

Mr. C. J. Robinson

Compensation for Aircraft Business

Personal

Attention: Mr. W. Ray Montgomery

This will confirm our telephone conversation the other day relative to your proposal regarding increased compensation on aircraft business on the West Coast.

It is my understanding that we were to quote you a net price on any special aircraft Thermoswitch. You were to take this price, review it with what you felt the traffic would bear on the particular application, and add to this price this proportionate amount. This would establish the price for this Thermoswitch, and you agreed to split the difference with us in order that we could all make more money on aircraft business.

I have discussed this matter with my associates

(Testimony of W. Ray Montgomery.)

and it is our decision that we cannot permit this action on your part for the following reasons. First, because we, as a manufacturer, must control the pricing of our Thermoswitches. Second, if you were allowed to proceed with this policy, the price established would then be the price over the entire country. This, of course, cannot be, since some aircraft companies would demand a lower price. Third, the control of such a program is practically impossible.

We will therefore continue to operate as we have in the past. We will establish the net prices on the Thermoswitches and you will receive your commission as previously agreed upon. We would appreciate your advising us, however, if you feel that any of the prices on existing Thermoswitches or any new Thermoswitches are too low. We will review the prices already established after we receive your comments.

It is our opinion that with the increased purchases which will take place in the aircraft industry, you will be adequately compensated, providing maximum effort is expended. I will reiterate my thinking regarding this effort as previously discussed during your recent visit. It is my opinion that the aircraft companies are not being adequately covered and that time is not properly allocated to give the correct amount of coverage.

After reviewing the new aircraft program efforts now set up, it would be my opinion that you should

(Testimony of W. Ray Montgomery.)

take steps to add at least a man, or two good men, to your staff in order to give proper coverage.

C. J. ROBINSON,
Sales Manager.

CJR:dd

[Endorsed]: Filed July 13, 1950.

Q. Directing your attention particularly to the second paragraph [277] reading:

“It is my understanding that we were to quote you a net price on any special aircraft thermo-switch. You were to take this price, review it with what you thought the traffic would bear on the particular application, and add to this price this proportionate amount. This would establish the price for this thermoswitch, and you agreed to split the difference with us in order that we could all make more money on aircraft business.

“I have discussed this matter with my associates and it is our decision that we cannot permit this action on your part for the following reasons.”

And then at the bottom of the page:

“It is my opinion that the aircraft companies are not being adequately covered and that time is not properly allocated to give the correct amount of coverage.”

Does that refresh your recollection on whether there was any criticism of the handling of the account?

A. No, sir.

(Testimony of W. Ray Montgomery.)

Q. There still wasn't? A. No.

Q. And, finally, Mr. Montgomery, I show you a copy of a communication to Montgomery Brothers from C. J. Robinson dated December 9, 1948, and ask you whether that was received in the usual course of business.

The Court: You can read it later. You know whether you got [278] the letter.

A. Yes, we got the letter.

Mr. Doyle: Very well. I request that that be marked Plaintiff's next in order, offered in evidence.

The Clerk: Plaintiff's Exhibit 39.

(Letter dated December 9, 1948, Fenwal to Montgomery, was marked Plaintiff's Exhibit No. 39.)

PLAINTIFF'S EXHIBIT No. 39

December 9, 1948

Montgomery Brothers, San Francisco

Mr. C. J. Robinson

Your Order 12356

Our Order X46477

Attention: Mr. F. H. Montgomery

Dear Fred:

Many times you write us regarding certain problems which confront you in the field which promise business and ask us to turn handsprings to give

(Testimony of W. Ray Montgomery.)

you answers. Oftentimes after having done exactly that, and having received the business, certain questions arise wherein we need information from you, and I must say that as of late, certain items have not been given the attention we feel they should have been given, nor have we had the courtesy of replies.

I refer specifically to the subject order covered in my letter of November 16. This order has been open since July 23. We do not feel that it can be ignored. We would like the courtesy of an answer. It certainly would seem to us that if this were properly handled, it merely requires some of you walking into the Purchasing Office at Boeing, laying the cards on the table and getting a definite statement from them as to what they intend to do about the matter.

I want to thank you for your letter of December 6, giving us a disposition of the balance of the Thermoswitches for Boeing on your order 11916. Before we received this disposition, however, it was necessary that I write you, that Dana Hill write you and finally that the matter be taken up with you by our Controller. This certainly should not be necessary. I think you will realize that when other people have to begin to take action in such matters, Montgomery Brothers are certainly being given many a black eye.

Possibly you feel that these matters are not your responsibility. We definitely believe that they are. Won't you please spend one day, or one week if it

(Testimony of W. Ray Montgomery.)

is necessary, to bring the subject order and any other such matters to a reasonable conclusion?

Very truly yours,

FENWAL INCORPORATED,

/s/ C. J. ROBINSON.

CJR:dd

cc: Mr. AC Drew

[Endorsed]: Filed July 13, 1950.

Mr. Doyle: That is all.

The Court: If you want to review your notes, we will take ten minutes here.

(Recess.)

Redirect Examination

By Mr. Christin:

Q. Mr. Montgomery, you were asked about the work that you had done to develop the thermostat, the model of which you have in your hand, and comparing it to the thermostat in Exhibit No. 35. I will ask you when and where and under what circumstances was the model you have in your hands developed?

A. This thermostat was a development of the Fenwal Company after the meeting in Kansas City at the T. W. A. Office.

Q. Who was there?

(Testimony of W. Ray Montgomery.)

A. Of the Fenwal Engineers, Mr. Poitras, Mr. Ryan, and myself, and a Chief Power Plant Engineer of the Lockheed Manufacturing Company. And it differed primarily in one respect from the switch that we had developed—that is, when I say “we,” I mean [279] myself and the Lockheed engineers. That difference is the difference that this switch in the mechanism that actuates the contact or in the temperature that contact is made, it is hermetically sealed, and we had no way of doing that with a standard switch except by modification, and the switch that we developed differed from the switch that they refer to in there, in their exhibit No. 35, inasmuch as the switch that they show there is this switch here, which is their standard switch as shown in the standard catalog, that they have used for quite some time, shown on the face of the cover of the catalog.

The reason that that switch was not satisfactory and could not have been used in aircraft is because in aircraft a fire detector switch is used at different parts of the aircraft, the greatest number being used in the engines themselves which are on the wing, or a part of the wing, where vibration is very, very high, and this switch as such, you make the calibration of the switch changeable by merely changing the calibration screw on the outside, and in its use in aircraft it would immediately become loose and you would not have any setting whatsoever.

(Testimony of W. Ray Montgomery.)

The next thing, in this particular switch we had to have some mounting whereby the loom that the wires come to the switch would be on a grounded circuit rather than to have a two-wire circuit like we have here, so that you could check the continuity of the switches as far as wiring was concerned while the plane [280] was on the ground or in flight, and at the same time you could tell if there was a break in the line by having the switch grounded, at what particular part the break might be.

At the time we developed the first switches for Lockheed, Fenwal wasn't making a fire detector switch as such. They gave us their standard catalog. So from the standard catalog we picked the switch that would be best applicable to the use that we intended to put it to.

Since the barrel of the switch wanted to be in the part of the airplane that would be subjected to fires, and the wiring preferably should be back at the fire wall, we used a flange sealed switch.

We offered to Fenwal to make that a grounded one-wire switch instead of a two-wire as in their standard.

The next thing we had to do was to put one of their standard locking devices on the adjustment screw so that the vibration would have no effect upon the change of the temperature setting of the switch.

The third thing that we put was a tamper-proof cap which we sealed so that anyone servicing the aircraft would not change the setting. That is why

(Testimony of W. Ray Montgomery.)

it differs from that particular switch that they used at the beginning of the entire proposition. And in putting our tamper-proof switch we made our pictures of it for Kansas City, we did everything we could short of hermetically sealing the switch, by using cascades of metal and pulling [281] them down as tight as possible.

Q. You were in constant touch with the Engineering Departments of the aircraft manufacturers and at the same time in touch with the Engineering Department of Fenwal?

A. We had to work as a liaison in between both of them.

Q. So far as engineering, Hawkins assisted you in that work? A. Yes, sir.

Q. And if you weren't there, he carried it on himself? A. Yes.

Q. Did Robinson and Turrene come out here often to see you?

A. They were out here on several occasions.

Q. And what assistance did they give you, if any, in getting business?

A. They gave us very little assistance, other than the fact that they would go with us to the aircraft companies and listen to us present the problem to the engineers that we talked to.

Q. Now, when you left San Francisco on the 26th, or after the last session in San Francisco on the 25th, and you were going to Los Angeles, as you understood it from what you had been talking about

(Testimony of W. Ray Montgomery.)

with Mr. Storkerson, had a definite agreement been reached? A. No, sir.

Q. And when you left Los Angeles after the conference of the 28th had in your opinion a definite agreement been reached? A. No, sir. [282]

Q. Was he to go back to the home office, confer and let you know?

A. That is right, and offer the tentative plan that we had proposed.

Q. These letters—calling your attention to Exhibit 31 shown you by counsel, August 26, 1947, from Mr. Robinson, the Sales Manager, and ask you when you received that letter requesting more sales, did you at that time understand it to be a criticism?

A. I did not.

Q. What did that mean to you?

A. This is purely and simply, from my standpoint, a letter that he has written to stimulate sales, offering suggestions where he thought we might better the service we could give them, and it is a typical Sales Manager's letter to stimulate his sales.

Q. And you regarded that as a constructive criticism, is that correct? A. Yes, sir.

Q. And did you after that attempt to carry out the suggestions of Mr. Robinson? A. Yes, sir.

Q. With reference to the letter of June 4, 1948, counsel read you but one part of it, the last paragraph.

Mr. Doyle: I didn't read it to him; he read it to me.

(Testimony of W. Ray Montgomery.)

Mr. Christin: Pardon me; it was read [283] by somebody.

Q. In reading the entire letter from the Sales Manager in its entirety, would you say that that, in your opinion as a Sales Manager yourself, was a criticism? A. No, sir.

Q. What did that mean to you, the entire letter?

A. Exactly the same thing. That is a letter written addressed to me to get me to increase our sales for him.

Q. And in that particular year the sales were as high as any year you ever had, is that correct?

A. Yes, sir.

Q. I call your attention to Exhibit 39, and this was written December 9, 1948, a very short time before the letter of cancellation——

A. Yes, sir.

Q. And when you received that letter and before the termination notice, what did you do, if anything? If that was a criticism did you do anything to correct it?

A. I think that we gave him the answer that he asked for.

Q. What was that?

A. We must have written him a letter in reply to this giving him the information he wanted.

Q. Have we that letter here?

A. I don't know whether it is in the file or not.

Mr. Christin: We will produce it. Now, may it please the Court and Counsel, I haven't attempted to segregate the trial. [284] I haven't gone into the element of damages on the cross-complaint, and I

(Testimony of W. Ray Montgomery.)

think it better not to go into that, maybe, until later, because that is more of an affirmative case. With that——

Mr. Doyle: I would suggest, in view of Your Honor's ruling—I understood from what Your Honor stated yesterday that there was no point in my making an argument on my motion to dismiss the cross-complaint as insufficient to state a claim. Your Honor indicated that he wanted to hear the evidence and then rule. I accordingly have not made the motion, and do not propose to do it at this time. I understand Mr. Christin is about to open his affirmative case on the cross-complaint.

The Court: Let me hear what he was going to say. He hadn't finished.

Mr. Doyle: Pardon me; I thought he had.

Mr. Christin: I was just saying that I would excuse Mr. Montgomery now and then continue with Mr. Fred Montgomery and then refer to the deposition of Mr. Hawkins, and then start my proof on the affirmative matter and damages.

The Court: All right. Step down.

Any further questions?

Mr. Doyle: I have no further questions, and I assume that you are through with this witness except on the damages.

Mr. Christin: Mr. Fred Montgomery.

FRED H. MONTGOMERY

called for plaintiffs, sworn. [285]

The Clerk: Will you state your name to the Court, please.

A. Fred H. Montgomery.

Direct Examination

By Mr. Christin:

Q. Mr. Montgomery, are you one of the partners in this business? A. Yes, sir.

Q. And as such, do you partners segregate your duties? Does one take care of one branch and one the other?

A. My brother Ray takes care mostly of the outside connections, and I take care of the administrative and office end principally.

Q. Was that way ever since 1944?

A. Yes, sir.

Q. And that way today? A. Yes, sir.

Q. Were you present at a conversation in your office on January 24th and 25th which was attended by Mr. Storkerson and your brother?

A. Yes, sir.

Q. Will you tell us that conversation as you recall it?

A. My brother Ray and I were in my office, and Mr. Storkerson came in. And after the usual greetings, my brother Ray said to Mr. Storkerson, "What is this cancellation all about?"

And Mr. Storkerson said, "I will give you a letter

(Testimony of Fred H. Montgomery.)

that I have brought out with me, which is signed by Mr. Walter. You will read the letter." And he gave the letter to me, and I read [286] it, and then my brother Ray said that there must be another reason other than stated in Mr. Walter's letter.

And Mr. Storkerson said, "I didn't come here to argue any points at all; I came here to effect the termination of the contract."

And my brother Ray said, "You know that that isn't the reason; and if you don't care to tell me the reason, I shall tell you the reason, and the reason is that you are going to open your own office in Los Angeles and our former employee is going to operate that office, without that combination it would be impossible for you to take—to enter into the business in Los Angeles."

And we discussed several things along that line.

We went to lunch. Ray and I discussed the proposition, and we decided at that time, Ray and myself, and we so stated to Mr. Storkerson——

Q. You can't state what you decided; just the conversation.

A. The conversation when Mr. Storkerson came back was that in substance, that we would be willing to carry on as we had heretofore, providing that they would exclude the Southern California territory which their office would take care of and we would continue in the rest of the territory as we had heretofore.

Mr. Storkerson said that he did not care to discuss that, he wanted to discuss the issue that he came out

(Testimony of Fred H. Montgomery.)

here to discuss, and he said there would be a subsequent matter that should be [287] taken up later.

And we told Mr. Storkerson—I told Mr. Storkerson that we would only discuss the matter in relation to a continuation of the contract, and if that wasn't acceptable, why, then, we would continue to, as we had heretofore, get all the orders that we possibly could, would carry on as we had been, and that we would expect all of the profit on the sales that we would turn in to Fenwal up to and including the last day of the month, the last of February.

And so Mr. Storkerson said "What is your proposition?"

And we stated that if that could be worked out, why, we would be willing to forego 50 per cent of our profit upon the orders in Southern California to the aircraft industry that had not been shipped prior to the termination of the contract.

And Mr. Storkerson said, "I have no authority whatsoever to make any commitment; it will have to be done in Ashland. However, I will be glad to make a recommendation, and that up to now, no recommendation that I have ever made has ever been turned down."

And we said, "Well, if we can proceed on that basis, what is the next move?"

Mr. Storkerson said, "I would like to have Ray meet me in Los Angeles and go to the aircraft industry, explain to them this transition, so that there will be no interruption in the termination of your contact and the beginning of our contact." [288]

(Testimony of Fred H. Montgomery.)

So with that my brother went to Los Angeles and met Mr. Storkerson.

Q. Did you see Storkerson again after that?

A. I saw him once after that in early March.

Q. In San Francisco?

A. In San Francisco. Mr. Storkerson came into my office.

Q. That is all right; you didn't see him between the time that he went to Los Angeles and the time he came back some time in March?

A. No, sir.

Q. In the beginning of your transactions with Fenwal you were the one who took care of the payment of invoices, were you not?

A. That is correct.

Q. In the firm? A. That is correct.

Q. For some period of time what was the general way of paying your bills, starting with '42 and up to a certain time?

A. We would pay all bills, including Fenwal's, on the 10th of each month for everything purchased in the preceding month.

Q. Did anything occur about 1947? Was Fenwal sending their statements on time?

A. There was a period for several months there that we got no statements at all, and we would have to pay from their invoices. They would send us an invoice with each shipment, and the end of the month came around and we couldn't tell whether or [289] not we had received all of the invoices in that calendar month. And I requested a state-

(Testimony of Fred H. Montgomery.)

ment each month so that we could reconcile the invoices with the statement before we send our check. That would eliminate errors, and if there was any mistake, we could catch it before we made our remittance. And there were several letters that passed between our Accounting Department and Fenwal requesting these statements.

Q. To correct that lapse of receiving statements, you did write a letter on May 20, 1947, Plaintiff's Exhibit 15, is that correct? (Showing.)

A. That letter was written by our Accounting Department.

Q. One of your letters? A. Yes.

Q. I read from Paragraph 5:

"We religiously pay all our accounts on the 10th of the month. If we could get your invoices rendered correctly with the correct discount, and also if we could get a statement from you each month by the 10th of the month, we would have your check in the mail every month on the night of the 10th. For instance, the last statement we received from you was for January, February and March. This was not sent until we requested same. Before that we had not received a statement from you since October. You can readily understand how hard it is to check your account unless we receive your statement each month."

After that were the statements sent to you each month by Fenwal? [290]

(Testimony of Fred H. Montgomery.)

A. I presume they were.

Q. Then, thereafter, as in the case of any of your other customers, you paid them on the 10th of the month, is that right?

A. Ever since we have been in business.

Q. Other than that letter, do you know of any agreement or anything in writing, so far as you know other than these letters, as far as you know, which changed the original contract which said nothing about the date of payment?

Mr. Doyle: If that is not a leading question on direct examination, Your Honor, "changed the original contract." Of course I will stipulate that the contract says nothing at all about time of payment.

Mr. Christin: That is all I want to know.

Mr. Doyle: Absolutely blank on that subject.

Mr. Christin: I will take that stipulation.

Mr. Doyle: He now interrogates the witness as to whether there were any writings which changed the original contract with respect to the time of payment.

Mr. Christin: I withdraw the question.

Mr. Doyle: I submit it is obviously a leading question.

Mr. Christin: Withdraw the question, if you will stipulate that there is nothing in the original contract as to the date of payment.

Mr. Doyle: The original contract speaks for itself. The [291] propriety of the question is nevertheless before the Court.

(Testimony of Fred H. Montgomery.)

Mr. Christin: I withdraw the question. That is all.

Mr. Doyle: No questions.

Mr. Christin: I will proceed with Mr. Hawkins' deposition at this time.

Mr. Doyle: I think you will have to. He isn't here.

The Court: I will read it.

Mr. Christin: Yes, Your Honor.

The Court: I can read it. Do you want to read it all?

Mr. Christin: No, I was just going to take parts of it, Your Honor.

Mr. Doyle: Of course, Your Honor, I didn't cross-examine. He was Mr. Christin's witness on the deposition. I didn't examine. Under the circumstances, I am perfectly willing to have any part of the deposition considered that is appropriate. I do make this observation: I objected to some parts of the conversation between Ray Montgomery and Hawkins at which no Fenwal person was present, as I did this morning in the course of the testimony.

I also pointed out that there were certain technical objections to Mr. Christin's right to take the deposition under the adverse witness provisions of the Federal Rules and under our Section 2055 of our local Code of Civil Procedure because he is not an officer, managing agent, and so on, of the corporate party; and not only that, but at the time of the occurrence of the matters [292] into which inquiry is made, he was in fact not an employee of Fenwal.

With these observations I have no objection to the Court reading all or any part of the deposition.

The Court: I will take it home and read it this evening. Put on your next witness.

Mr. Christin: Just one minute.

W. RAY MONTGOMERY

recalled on behalf of Plaintiffs, previously sworn.

Direct Examination

By Mr. Christin:

Q. When did Mr. Hawkins cease his employment with you?

A. The latter part of January, 1949.

Q. And he was no longer your employee at the 1st of February, 1949? A. No, sir.

Q. Did you see him in the employ—did you see him doing work, you yourself, for Fenwal in February? A. In February?

Q. Yes, sir. A. Yes, sir.

Q. Where did you see him and what was he doing?

A. In the office that they had rented in Los Angeles.

Q. And who was in that office at the time you saw him there?

A. He was getting it ready to open up by putting in partitions [293] and painting and things of that particular nature.

Q. At that time you were about to change your offices too in Los Angeles, were you not?

(Testimony of W. Ray Montgomery.)

A. Yes, sir.

Q. Did Mr. Hawkins, when he was working for you, suggest that you take the offices which later were rented to Fenwal?

A. He had me look at that office prior to the time that the Fenwal Company looked at it.

Q. And then you didn't take those premises?

A. No, sir.

Q. And they were taken by Fenwal.

A. That is right.

Q. And you moved also, didn't you?

A. Yes, sir.

Q. During Mr. Hawkins' employment with you had you had any difficulty with him at all—misunderstandings with Hawkins? A. No, sir.

Q. Did he ever complain to you that he was not getting the proper assistance from you in his work? A. No, sir.

Q. He asked for increases in salary once in a while? A. Yes, sir.

Q. And those were usually granted?

A. Yes, sir.

Q. Before you received the letter of resignation did he advise [294] you he was going to quit?

A. No, sir.

Q. Did he, so far as you know, advise any member of your organization that he was going to quit?

A. No, sir.

Q. And when he quit, did you go right down to Los Angeles?

(Testimony of W. Ray Montgomery.)

A. I went down on the—the first time after we received the termination notice of our contract, which was on the 31st day of December, 1948, I went to Los Angeles on Monday, or was in Los Angeles on Monday, January the 10th, for the first time.

Q. In substance, in your conversations, if you had same, with Hawkins did you in substance ask him to reconsider?

Mr. Doyle: Let's not lead; let's get to the conversation.

Q. (By Mr. Christin): All right. What conversation did you have with Mr. Hawkins?

A. I asked Mr. Hawkins what in the world he meant—

Mr. Doyle: Before we proceed with the conversation, I shall urge the same objection made this morning, that discussion between Mr. Montgomery and Mr. Hawkins in January of 1949, is not binding upon the plaintiff; it is hearsay as to this plaintiff.

The Court: I am going to reverse my ruling of a little while ago and admit it subject to objection. Go ahead with this line.

The Witness: I asked Mr. Hawkins— [295]

Mr. Doyle: Further I should say—I beg your pardon, Mr. Montgomery—that Mr. Hawkins himself testified on this subject in his deposition.

The Witness: I asked Mr. Hawkins what in the world he meant by treating Fred and myself the way he did, and I called attention to the fact that

(Testimony of W. Ray Montgomery.)

in my opinion Fenwal without him could very—could hardly afford to open up an office in Los Angeles, since, he, himself, had all of the contacts with the major accounts that were using Fenwal products.

Then I asked him, “Edgar, when did you know that this was going to take place?”

“Well,” he said, “I knew that in September of 1948.”

And I said, “Why in the world didn’t you tell me at that time? You knew that I was going back to the factory in the Fall of the year, and I am quite sure I could have straightened this matter out had I have known of it.” He hung his head and told me that he guessed he should have done that.

I said, “Have Fred and I done anything that would deserve us—that we would deserve this type of treatment from you? Haven’t we always been fair with you? Why, then, wouldn’t you be fair with us and let us have an opportunity to keep this account by letting me talk to the principals before this action was taken.”

He said, “Ray, I had to make up my mind very quickly on this. I talked with Mr. Storkerson at length on the telephone” [296]—and I think that he talked with the office—“then I made up my decision that I was going to resign from Montgomery Brothers to take this position with Fenwal. It was my decision. I am going to have to live with it,

(Testimony of W. Ray Montgomery.)

and there is nothing that you can do or say that will change my opinion at this time."

Then I told Edgar, "Edgar, I am very, very disappointed. We have taken you from a young fellow; we have brought you up to a very valuable man to Montgomery Brothers. In my opinion we have given you a compensation above anything that you could get from anyone in the city of Los Angeles; but if you have made your decision, then I can only ask you to do one thing; to help us close all the business that we can prior to the expiration of our contract, which you know will be 60 days from the time that we received this notice on December 31, 1948." And he agreed to do that.

Q. (By Mr. Christin): Now, after you had a conference with him and Mr. Storkerson in Los Angeles—is that right? A. That's right.

Q. What were Mr. Hawkins' actual duties in Los Angeles? What did he do there?

A. He was the manager of the office, checked the work of the other employees, checked the sales, checked the paper work, that came from Los Angeles to San Francisco, and specialized in the sale of Fenwal and the Automatic Pump & Softener account.

Q. Did he have anything to do with [297] Weigand?

A. He sold Weigand but not specializing in that particular proposition.

Q. Did he, as office manager, have access to all

(Testimony of W. Ray Montgomery.)

the books, records and files of business done by Montgomery Brothers in the Los Angeles area?

A. Yes, sir.

Q. What were the nature of those documents to which he had access? What did he do down there?

A. All the orders that we had received, all the acknowledgments that he has sent up to us on sales—for we bill upon the acknowledgement of the shipment of an order to our customers, the billing being done in San Francisco, and copies of our invoices sent to the office that has sent in the acknowledgment. He also forwards to San Francisco all requisitions for material that we do not have in stock, but that will have to be ordered from the factories and subsequently shipped from them.

Q. Was there any other employee in the Los Angeles area in the month of January, 1949, who could carry on his activities? A. No, sir.

Q. Was there anyone in any one of your other branches that could carry on the Los Angeles business in January, 1949?

A. I should answer that "No, sir," because they would not have the contacts or know the city or know the customers like Mr. Hawkins did.

Q. Who contacted those airplane customers in Los Angeles during the Fenwal sales agreement other than you and Mr. Hawkins? [298]

A. No one from our office in Los Angeles.

Q. Would you send people from the northern office or from San Francisco to contact the Los Angeles trade? A. Would we send—

(Testimony of W. Ray Montgomery.)

Q. Would you send the man from Boeing, Reed, to Los Angeles at any time? A. No, sir.

Q. Or would you send Conant from San Francisco down there?

A. No, sir, not to contact the aircraft factories.

Q. When you knew that he was going to leave and he wouldn't change his mind, what did you do with reference to adjusting your situation in Los Angeles?

A. I had to cast about to find a man that could come into our office to assume the duties that he had had after we had had an opportunity to break him into that type of work. You must remember that it had taken us quite some time to get Mr. Hawkins from the point that we received him in Los Angeles as a cub or as a clerk up to the point of him being manager.

Q. Did you know any man at that time in January, 1949, who was at that time qualified to carry on those activities of Hawkins?

A. I did not.

Q. How long did you have to stay in Los Angeles to straighten this situation out?

A. I was there off and on most of the time. [299]

Q. For how long?

A. A matter of some six months.

Q. In casting about did you find another individual to employ?

A. I employed two individuals, one Mr. Ralph O. Dodge, who had been working for the Douglas

(Testimony of W. Ray Montgomery.)

Corporation—Douglas Aircraft Corporation, and another, Mr. Ray Gray. [299-A]

Q. Had Mr. Dodge ever been Manager or General Manager or Assistant Local Manager for any firm such as Montgomery Brothers, so far as you know? A. Not to my knowledge, no, sir.

Mr. Doyle: Pardon me. May it please the Court I object to this line of interrogation upon the ground that since the contract was terminated upon 60 days notice, it was unnecessary any longer to sell Fenwal products to the aircraft industry; Mr. Montgomery did not need any men for that job after the effective date of termination of the Fenwal agreement, so that whether they employed somebody else to do the work that was no longer do-able under the contract is neither an item going to the existence of the cause of action nor to the damage feature upon which they claim.

The Court: He has answered. The answer may stand subject to the objection.

Q. (By Mr. Christin): Did Hawkins do anything else other than contact Fenwal customers?

A. Well, I should say he did.

Q. Was he the office manager?

A. Yes, sir.

Q. And he also met the trade and handled these other sales to the other parties?

A. He specialized in the Automotive Pump and Softener Company's account. [300]

Q. The man that you were casting about to get was a man, I take it, who would be able to carry

(Testimony of W. Ray Montgomery.)

on the activities of Hawkins regardless of the sales to the Airplane companies? A. Absolutely.

Q. You at that time knew that your airplane business would cease? A. That is right.

Q. On March 1, is that right?

A. That is right.

Q. Unless some agreement was reached with Fenwal in the interim; is that correct?

A. That is right.

Q. This man Dodge that you got, so far as you know, you said he had never had a managerial position before, is that correct?

A. Not to the best of my knowledge.

Q. What was his line of activity with the aircraft people from whom you got him?

A. He was an engineer in the heating and ventilating division of the Engineering Department at the Douglas Aircraft Company. He headed up that department.

Q. He headed up that department?

A. That is right.

Q. And then you brought him to Montgomery Brothers? A. That is right.

Q. The other fellow—what was his name? [301]

A. Mr. Gray.

Q. Who was he?

A. He was a man that I employed to do the clerical work and handle this work that Mr. Hawkins had been overseeing.

Q. And so far as you know, had he ever had the managerial duties of an office manager?

(Testimony of W. Ray Montgomery.)

A. No, sir.

Q. With these two men you spent a considerable period of time, is that right?

A. That is right.

Q. How long would you say it took you to get that office in Los Angeles running on an even keel?

A. I could answer that by saying it isn't on an even keel at the present time.

Q. Well, have you done all you possibly can do to get it to run on an even keel?

A. It takes quite a time, Mr. Christin, for us to break in a man. In a small office a man must be versatile; he must be able to handle all the things that we do; he must specialize in certain lines and he must have the ability to manage other people if he is going to be the Manager, and that takes time for him to gain the necessary experience to do that type of a job.

Q. In this transition from Hawkins to the new personnel, did your suffer a diminution of business exclusive of the aircraft business during that period of time? [302]

A. Yes, sir.

Q. Are you able to tell us how much?

A. I read the—I gave the difference in the amount of the business. The Los Angeles office in 1948, the total Los Angeles sales of all the things Montgomery Brothers sold, \$474,479.11; in 1949 was \$300,940.27; a reduction in the total amount of business that we did in the office of some 17,000—no, \$170,000.00.

(Testimony of W. Ray Montgomery.)

Q. Do you know how much of that was the airplane business?

A. How much of that was the airplane business?

Q. Yes.

A. At that time, the total amount of profit that we could have made, I don't have it broken down from the standpoint of Los Angeles, but I have——

Q. Can you get it by the morning?

A. Yes.

Q. How much of that was airplane?

A. Yes, sir.

Mr. Doyle: I would suggest in that connection, if Your Honor please, that for the purposes of interrogation on cross-examination of this witness that they produce for 1949, 1948 and back through 1942 their copies of the partnership federal income tax returns——

Mr. Christin: If Your Honor please——

Mr. Doyle: So we can interrogate the witness with respect [303] to the partnership earnings over these periods.

Mr. Christin: Our books are entirely open to you for any kind of accountant you want to put on them.

Mr. Doyle: That would include the partnership returns?

Mr. Christin: Just a minute, we are very substantial merchants in this community and we have competitors, and we may be competitors of these people, and I do not think—I call upon the Court's discretion to not have us produce income tax returns at this time. The books are open to you to

(Testimony of W. Ray Montgomery.)

put your accountant over there, anything you want, but I don't think that it is proper to go and get a man's income tax on one branch of the case just for satisfying curiosity. The same information is available to you in our books. They are presumed to be correct. If they are not, we will stand corrected.

Mr. Doyle: I have absolutely no interest in the returns of these gentlemen individually or the figures they show. What I am interested in is the partnership returns if there is to be interrogation about partnership income and expense.

Mr. Christin: I don't see the materiality.

Mr. Doyle: I suppose these gentlemen split their income 50-50; I don't know what they do.

Mr. Christin: What is that?

Mr. Doyle: That is up to them, but the partnership return shows the income and expenses.

Mr. Christin: Our books show it completely. I don't think [304] it is proper in a case to make divulgement of the income tax returns which are at least quasi confidential. We have no objection to showing the Court; we will give the Court the income tax returns and he may check them. I don't like to have it divulged in a public record of two merchants of this city, and have them blasted forth to the general public. I will answer the Court's discretion. If you want to see them, if it is material, the Court may look at them.

The Court: Go ahead with your examination. We are not up to that yet.

(Testimony of W. Ray Montgomery.)

Mr. Christin: I wanted to do this to save time. Anything you want brought here in the morning, tell me now, and I will have it here.

The Court: He says he wants the income tax returns. That is all he said he wanted.

Mr. Christin: No, no, he wanted something else.

The Court: No, he did not.

Mr. Christin: All right; he isn't going to get them at the present.

Q. What did you pay these men, do you know? Dodge?

A. I gave Mr. Dodge a salary of \$400.00 per month, and in 1949 we paid a bonus of \$4,000.00. We paid Mr. Ray Gray an average salary because he got a raise, of \$200.00 per month, and paid him a bonus of \$700.00 during the year of 1949.

Q. Did the fact that Hawkins was no longer there cause any [305] criticism as far as you understand of your general reputation, that he had been taken away from you?

A. Cause any criticism?

Q. Yes, that you had lost this valuable man?

A. Well, I have had people tell me that I must have had a hard time replacing Mr. Hawkins, but I don't think I have had any criticism.

Q. Put it this way: In your opinion, as you see it now, have Hawkins' activities with your company been fully substituted for by the activities of these two men you have——

A. No.

Mr. Doyle: Now, we are asking the witness for his opinion as to whether the people think about the

(Testimony of W. Ray Montgomery.)

subject. I submit the question is objectionable and I object to it on the ground that it calls for a conclusion of the witness.

The Court: It is admitted on the subject of punitive damages. Do you have punitive damages in California?

Mr. Christin: Yes, we have.

The Court: You are living in a very modern State. You ought to pick up that.

Mr. Christin: The only thing we do not have in California are hop barrel cases.

The Court: The objection is overruled.

The Witness: Will you repeat the question?

Mr. Christin: Will you please read the [306] question?

(The reporter read the question.)

The Witness: I still don't understand the question.

Q. (By Mr. Christin): Put it this way: Have the activities of the two men who are there now in the present training and condition in the business entirely substituted the services which were being rendered by Mr. Hawkins while he was there?

A. No, sir.

Mr. Christin: If Your Honor please, we will have to come back tomorrow morning anyway, and I have to see some people who are leaving for Europe.

The Court: You are about through?

Mr. Christin: Just about through.

The Court: Suppose you finish with him, and if

(Testimony of W. Ray Montgomery.)

you have something else I will let you open it up.

Mr. Christin: All right.

The Court: I would like you to go home and feel you left the doors open.

Mr. Christin: I beg your pardon?

The Court: Go ahead.

Mr. Christin: I didn't quite get that.

Q. Are you able to tell us now the actual money damages in a lump sum that you sustained actually?

Mr. Doyle: Now he is asking the witness a question which is addressed to the Court.

Mr. Christin: Very well. That is what I want to know. [307]

Q. Have you done all you can from your standpoint in your capacity in that business to alleviate the situation which existed by reason of Hawkins quitting? A. Yes, sir.

Mr. Christin: That is all for the present.

The Court: This will be your last witness, won't it?

Mr. Christin: Yes, Your Honor.

The Court: Do you expect to have rebuttal?

Mr. Doyle: I don't believe so, Your Honor.

The Court: You gentlemen probably will then be ready to argue the case tomorrow.

Mr. Doyle: I shall be ready to argue it tomorrow morning.

The Court: We will adjourn until tomorrow morning at 10:00 o'clock.

(Whereupon an adjournment was taken until Friday, July 14, 1950.) [308]

Friday, July 14, 1950, 10 o'Clock A.M.

The Clerk: Fenwal Incorporated versus Montgomery Brothers on trial.

W. RAY MONTGOMERY

recalled, having been previously sworn.

Direct Examination

(Continued)

By Mr. Christin:

Q. You were to bring some figures that Mr. Doyle asked you for. Have you those figures here?

A. Yes, sir.

Q. Mr. Doyle wanted to know some figures.

A. Do you want me to give Mr. Doyle those figures?

Mr. Christin: Yes.

Mr. Doyle: Proceed with your examination, Mr. Christin.

Q. (By Mr. Christin): Mr. Montgomery, have you in mind the amount of damages to your business by reason of the interference in having Mr. Hawkins taken away from you?

A. Yes, sir.

Q. What is that amount?

A. \$50,000.00

Mr. Christin: That is all.

Cross-Examination

By Mr. Doyle:

Q. When you stated yesterday, Mr. Montgomery, that Mr. Hawkins had access to all the books, records and files of Montgomery Brothers, did you

(Testimony of W. Ray Montgomery.)

mean that he had access to your general books and so on?

A. He had access to all the files pertaining to the business of [309] the Los Angeles office in Los Angeles.

Q. Not to the San Francisco office?

A. No, sir. He could come up any time for that. We have never refused him. He had never asked for it.

Q. The files that he had access to were those in the Los Angeles office?

A. The things that he had to do with, yes.

Q. Directing your attention to the provision of the contract of May, 1946, which is in evidence here as Plaintiff's exhibit 1 and to Paragraph 8 thereof and to the last sentence of Paragraph 8:

"At the termination of this contract, Montgomery agrees to return to Fenwal all samples, papers, price lists or belongings of Fenwal which may be in the possession of Montgomery at the time and an active list of purchasers of switches."

Do you know whether an active list of purchasers of switches was given to Fenwal upon the termination of this contract?

A. It was never asked for.

Q. When you saw Mr. Hawkins in Los Angeles early in January, 1949, did you discuss with him the relatively poor position of Fenwal and the relatively good position financially of Montgomery Brothers?

A. Yes, sir.

(Testimony of W. Ray Montgomery.)

Mr. Doyle: That is all.

The Witness: Did you want these figures? [310]

Mr. Doyle: No, thank you.

The Witness: Thank you.

Redirect Examination

By Mr. Christin:

Q. Just a moment. I will put those figures in evidence.

Q. Have you a breakdown there of the amount of business which was done in the Los Angeles office in the year 1948?

A. The amount of business that was done in Los Angeles?

Q. Yes.

A. I gave that yesterday. I don't happen to have it here.

Q. Have you the amount of Fenwal business that was done in Los Angeles in '48.

A. No, sir, I haven't it with me.

Q. What figures did you bring?

A. I brought the figures of the total amount of business for 1948 of Montgomery Brothers.

Q. What was that?

A. And the percentage of the business of the total that was Fenwal business.

Q. What is the total amount?

A. \$1,308,081.78.

Q. What proportion of that was Fenwal?

A. Approximately 40 per cent.

(Testimony of W. Ray Montgomery.)

Q. What was the business in 1949?

A. \$813,772.36. [311]

Q. What percentage of that was Fenwal?

A. Approximately 12 per cent.

Q. Have you got the figure there?

A. Yes, sir.

Q. What is it?

A. The actual figure is \$68,421.78. The actual figure of the first—of the 1948 business was \$346,920.44.

Mr. Christin: That is all.

Recross-Examination

By Mr. Doyle:

Q. Would you say, Mr. Montgomery, that most of the reduction in the figure in 1949 was on account of the termination of the Fenwal contract?

A. Yes, sir.

Mr. Doyle: That is all.

Q. (By Mr. Christin): While you were organizing this new setup in Los Angeles did you lose other business also? A. Yes.

Mr. Christin: That is all.

That is all, Your Honor.

We offer in evidence Plaintiff's interrogatories which were submitted and answered by Dr. Walter in evidence. They are on file.

Mr. Doyle: No objection.

The Court: Admitted.

Mr. Doyle: Plaintiff rests.

Mr. Christin: Defendants and cross-complainants rest. [312]

The Clerk: Defendant's Exhibit D.

(The interrogatories and answers of Dr. Walter referred to, were marked Defendant's Exhibit D in evidence.) [313]

DEFENDANT'S EXHIBIT D

[Defendant's Exhibit D is identical to Interrogatories Directed to C. W. Walter and Answers to Interrogatories. See pages 68 to 71 of this printed record.] [313-A]

* * *

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 407 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ W. A. FOSTER.

[Endorsed]: Filed December 7, 1950.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD
ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the parties, to wit:

Complaint for Breach of Contract.

Motion for More Definite Statement.

Notice of Motion for More Definite Statement.

Answer and Cross-Complaint.

Contains Exhibit A and Exhibit B.

Demand for Trial by Jury.

Answer to Cross-Complaint.

Request for Interrogatories, Directed to C. M. Walter.

Request for Interrogatories, Directed to J. M. Storkerson, General Manager, of Fenwal, Incorporated.

Answers of J. M. Storkerson to Interrogatories and Certain Attached Papers.

Answers of C. W. Walter to Interrogatories.
Stipulation.

Memorandum Re Proposed Judgment.

Memorandum of Decision.

Findings of Fact and Conclusions of Law.
Judgment.

Notice of Entry of Judgment.

Notice of Appeal by Plaintiff.

Notice of Appeal by Defendants.

Designation of Record on Appeal of Appellant
Fenwal, Incorporated.

Designation of Record on Appeal of Cross-Appellants, W. R. Montgomery and Frederick H. Montgomery, doing business under the firm name and style of Montgomery Brothers.

Order Extending Time to File Record on Appeal and to Docket Appeal in Circuit Court.

Deposition of Edgar V. Hawkins—Not filed—in the Folder of this case.

Reporter's Transcript on Appeal for July 11, 12, 13, 1950.

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 and 39.

Defendants' Exhibits Nos. A, B and C.

Order Extending Time to File Record on Appeal, etc., to December 29, 1950.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 20th day of December, A.D. 1950.

[Seal]

C. W. CALBREATH,
Clerk.

By /s/ M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12777. United States Court of Appeals for the Ninth Circuit. Fenwal, Incorporated, a corporation, Appellant, vs. W. Ray Montgomery, Frederick H. Montgomery and Montgomery Brothers, a partnership, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 20, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12777

FENWAL, INCORPORATED, a Corporation,
Plaintff-Appellant,

vs.

W. RAY MONTGOMERY, FREDERICK H.
MONTGOMERY, and MONTGOMERY
BROTHERS, a Partnership,
Defendants-Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT FENWAL, INCORPORATED,
INTENDS TO RELY

The points upon which Plaintiff-Appellant, Fenwal, Incorporated, intends to rely on appeal are as follows:

1. The Court erred in making and entering its findings of fact set forth in Paragraph IV of the Findings of Fact and Conclusions of Law, which said paragraph reads as follows, to wit:

IV.

“That it is true that certain orders were placed by defendants with plaintiff prior to February 28, 1949. That said orders were accepted by plaintiff, filled and delivered by said plaintiff after February 28, 1949, which resulted in a financial benefit to said plaintiff in that plaintiff realized a profit on the articles so sold and delivered, and further benefitted

by the continuation of business between the plaintiff and the buyers thereof; that the services rendered by defendants in obtaining and filing of said orders with plaintiff were not gratuitously performed. That pursuant to the stipulation of the parties hereto filed July 14, 1950, the profits of defendants upon all orders obtained by the defendants and filled by the plaintiff would be \$36,525.20.

“That said sum of \$36,525.20 represents the profits which defendants would make on the resale by defendants to their customers of goods shipped to said customers under orders placed by defendants with plaintiff prior to the effective date of termination of said contract and accepted by plaintiff. Shipments of said goods were made by plaintiff to defendants’ said customers under an assignment from defendants to plaintiff, which said assignment was made without waiving the rights of either defendants or plaintiff.”

for the reason that said findings are contrary to the evidence in that the evidence is to the effect that a portion only of the orders was accepted by plaintiff and the balance of said orders was rejected by plaintiff; that pursuant to stipulation of the parties, filed herein on July 14, 1950, the sum of \$17,361.46, and not the sum of \$36,525.20, represents the profit which defendants would make on the resale by defendants to their customers of goods shipped to said customers under orders placed by defendants with plaintiff prior to the effective date of termination of the contract and accepted by plaintiff.

2. The Court erred in deciding that defendants are entitled to their profit on all orders accepted, on a quasi-contract basis—benefit to plaintiff.

3. The Court erred in concluding that defendants are entitled to an offset in the sum of \$36,525.20 against the amount plaintiff is entitled to recover from defendants, to wit, the sum of \$46,435.40, and in failing to conclude that the defendants were not entitled to any offset whatsoever.

4. The Court erred in rendering judgment in favor of plaintiff for the sum of \$10,110.20 with costs to neither party, and in failing to render judgment in favor of plaintiff for the sum of \$46,635.40 with interest and costs.

5. The Court erred in allowing defendants to offset profits in the sum of \$36,525.20 and in failing to consider that there should be deducted from said profits the cost to plaintiff of servicing the orders on which said profits were allowed.

Dated: San Francisco, California, January 2, 1951.

/s/ MORRIS M. DOYLE,

/s/ JOSEPH W. GROSSMAN,

McCutchen; Thomas, Matthew,
Griffiths & Greene.

Of Counsel.

Receipt of Copy acknowledged.

[Endorsed]: Filed January 2, 1951.

